Petition

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81-450

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

RICARDO VALENZUELA-BERNAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

CARTER G. PHILLIPS
Assistant to the Solicitor General

CAROLYN L. GAINES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the government violates a defendant's right to due process or to compulsory process by deporting illegal alien witnesses after officials of the government have interviewed the witnesses and concluded that they can provide no evidence on behalf of the defendant different from that available from alien witnesses who are retained to testify at trial.

2. Whether, assuming that the deportation of illegal aliens violates the defendant's rights, dismissal of the indictment is the appropriate remedy when the defendant cannot demonstrate any prejudice caused by the absence of the witnesses.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provisions involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	16
Appendix A	1a
Appendix B	10a
Appendix C	11a
Appendix D	15a

TABLE OF AUTHORITIES

Cases:

Branzburg v. *Hayes*, 408 U.S. 665 11
Brown v. *United States*, 375 F.2d 310, cert. denied, 388 U.S. 915 10
McCray v. *Illinois*, 386 U.S. 300 ..... 10, 11
People v. *Mejia*, 57 Cal. App. 3d 574, 129 Cal. Rptr. 192 7
Roviaro v. *United States*, 353 U.S. 53 ..... 10, 11, 14
United States v. *Arredondo-Morales*, 624 F.2d 681 .. 9, 10
United States v. *Avila-Dominguez*, 610 F.2d 1266 .. 8, 9, 12, 13
United States v. *Blue*, 384 U.S. 251 15
United States v. *Bumatay*, 480 F.2d 1012 10
United States v. *Calzada*, 579 F.2d 1358, cert. dismissed, 439 U.S. 920 ..... 7, 8, 9, 13
United States v. *Carrillo-Frausto*, 500 F.2d 234 13
United States v. *Gonzalez*, 617 F.2d 1358 7
United States v. *Henao*, No. 80-5145 (5th Cir. Aug. 7, 1981) 9, 13
United States v. *Lovasco*, 431 U.S. 783 14

Cases—Continued

	Page
United States v. *Marion*, 404 U.S. 307	14
United States v. *Martinez-Morales*, 632 F.2d 112	7
United States v. *McPhatter*, 473 F.2d 1356	10
United States v. *McQuillan*, 507 F.2d 30	7
United States v. *Mendez-Rodriguez*, 450 F.2d 1	5, 6-7, 8, 9, 12
United States v. *Morrison*, No. 79-395 (Jan. 13, 1981)	14, 15
United States v. *Perlman*, 430 F.2d 22, cert. denied, 400 U.S. 832	8
United States v. *Sanchez-Murillo*, 608 F.2d 1314	7
United States v. *Tsutagawa*, 500 F.2d 420	7, 8, 14
United States v. *Winnie Mae Mfg. Co.*, 451 F. Supp. 642	7
Warden v. *United States*, 391 F.2d 747	10
Washington v. *Texas*, 388 U.S. 14	11

Constitution and statute:

United States Constitution:	
Fifth Amendment	2, 4, 5
Sixth Amendment	2, 4, 5
18 U.S.C. 1324(a)(2)	2, 5

Miscellaneous:

1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* (1977)	15

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v.

RICARDO VALENZUELA-BERNAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-9a) is reported at 647 F.2d 72. The oral opinion of the district court denying respondent's motion to dismiss his indictment (App. C, *infra*, 11a-14a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 10a) was entered on June 5, 1981. On July 24, 1981, Justice Rehnquist extended the time with-

in which to file a petition for a writ of certiorari to and including September 3, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor * * *.

STATEMENT

Respondent was indicted in the United States District Court for the Southern District of California on one count of transporting an illegal alien, in violation of 8 U.S.C. 1324(a)(2). Following a bench trial on stipulated facts, respondent was convicted. He was sentenced to five years' imprisonment, with all but 179 days suspended, to be followed by five years' probation. On appeal, a panel of the Ninth Circuit reversed respondent's conviction and ordered the indictment against him dismissed. It held that respondent had been denied due process and compulsory process rights when the government deported two of the illegal aliens transported by respondent without allowing him an opportunity to interview them.

1. At about 5:00 p.m. on March 29, 1980, an automobile approached the Border Patrol Checkpoint

at Temecula, California (Tr. 33).[1] An agent motioned for the car to stop, but it continued moving through the checkpoint at a slow speed (Tr. 34). As the car went past, the agent saw respondent driving the car with five people lying down inside of it (Tr. 36-37). When the agent attempted to open the car door on the driver's side, the car sped away (Tr. 37). Two other agents pursued the car at a high rate of speed for about a mile (Tr. 42). The car stopped abruptly, and all of the occupants of the car fled on foot (Tr. 43-44). Two passengers escaped, but respondent and the other three passengers were apprehended (Tr. 46; Supp. Tr. 8).

Following the arrest, respondent and the other passengers were interviewed by criminal investigators. After receiving *Miranda* warnings, respondent agreed to answer questions under oath and to have the conversation taped. Respondent admitted to the investigator that he had entered the country illegally with the assistance of a smuggler and that he had agreed to drive the other passengers in return for not having to pay for his own illegal entry (St. 2, 5). When asked why he did not stop at the checkpoint, respondent answered "since I was bringing the people I already knew that I had had it/too late/it was done" (St. 4). The investigator called an Assistant United States Attorney in the Southern District of California, described to him the circumstances surround-

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[1] "Tr." refers to the transcript of the hearings on June 2 and 12, 1980 before the district court on respondent's motion to dismiss the indictment. "Supp. Tr." refers to the transcript of the supplemental proceedings on June 12, 1980. "St." refers to respondent's statement to the Border Patrol investigator after his arrest, which was made a part of the record before the district court.

ing respondent's arrest, and told him about the respondent's statement. The investigator also informed him that the three passengers who were arrested with respondent all told basically the same story and did little more than identify respondent as the driver of the car (Supp. Tr. 9).

The Assistant United States Attorney told the investigator to select any one of the three passengers to remain so that the government would have a nonhearsay basis for establishing that the witness was an illegal alien (Supp. Tr. 8). He also decided on the basis of the investigator's statements that no useful purpose would be served by requiring the other two aliens to be incarcerated pending respondent's trial, and he therefore authorized their release back into Mexico (*ibid.*).

2. Prior to trial, respondent filed a motion to dismiss the indictment, alleging violations of the Fifth and Sixth Amendments. In support of his claim, respondent argued that the return of the illegal aliens deprived him of the opportunity to interview actual witnesses to the crime and to determine what aid they could be to his defense. In addition, respondent claimed that by returning the illegal aliens to Mexico the government had denied him the right to compulsory process to obtain their presence at his trial. Respondent made no attempt to suggest what knowledge these two witnesses had or what testimony they might provide that could have helped him in this case.

The district court, after hearing the testimony of the remaining illegal alien, two investigators at the Border Patrol Checkpoint and the Assistant United States Attorney who authorized release of the other two illegal aliens, denied respondent's motion to dis-

miss the indictment. The court reasoned (App. C, *infra*, 12a):

> [H]is sixth amendment rights are clearly not violated. It wouldn't make any difference what those other witnesses said if in fact the defendant is only going to be charged with the one witness who's here, because he's confessed to the transporting of these individuals, including the defendant [sic] that's here.

Thereafter, without presenting any defense to the crime charged, respondent agreed to submit the case to the district court sitting without a jury on the basis of a stipulated record (Tr. 50-53). The court found respondent guilty (Tr. 61).

3. The court of appeals reversed the district court's denial of respondent's motion to dismiss the indictment (App. A, *infra*, 1a-9a). On the basis of *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971), and other decisions following it,[2] the court of appeals concluded that, if testimony from the absent aliens could "conceivably benefit" a defendant, then their deportation by the government prior to trial violated the respondent's Fifth and Sixth Amendment rights (App. A, *infra*, 5a-7a). The court found that it was conceivable that the illegal aliens might have testified that respondent did not know that they were "illegal aliens who had been in this country for less than three years" as required by 8 U.S.C. 1324 (a)(2).[3] The court of appeals concluded that the

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[2] See cases cited in note 4, *infra*.

[3] The court of appeals did not discuss the prosecution's offer to stipulate that "none of the persons released ever told the defendant they were illegally present in the United States * * * *" (Tr. 17). Respondent, however, did not react to the

necessary remedy for the "prejudice" caused by the loss of these witnesses was dismissal of the indictment (App. A, *infra*, 7a).

REASONS FOR GRANTING THE PETITION

This case presents important and recurring questions concerning the application of the Due Process Clause and the Compulsory Process Clause to cases in which illegal aliens who were present at the scene of a crime are returned to their own country prior to trial. The obligations imposed by prior Ninth Circuit decisions to retain illegal aliens as material witnesses have resulted in needless incarceration of many such individuals and substantial overcrowding of jails and other detention facilities. In addition, the legal issues have produced inconsistent adjudications among the courts of appeals. Accordingly, we believe review by this Court is now needed.

1. The decision by the court of appeals in this case is the most recent in a long line of confusing decisions spawned by the Ninth Circuit's opinion ten years ago in *United States* v. *Mendez-Rodriguez*, 450

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offer before the district court, and the record does not make clear whether the stipulation was considered by the district court when it took the case under advisement. This offer was as favorable as the only testimony even arguably helpful to respondent elicited from the one remaining illegal alien witness, who testified that he never spoke with respondent (Tr. 14).

The court of appeals did explain why in its view respondent's post-arrest statement did not eliminate any "conceivable benefit" he might have gained from the testimony of the deported witnesses. It held that the statement was only an admission and not a confession, because it did not acknowledge all elements of the crime, particularly knowledge of the illegal alien status of the passengers (App. A, *infra*, 8a-9a & n.4).

F.2d 1 (9th Cir. 1971).[4] In that case the defendant was charged and convicted, as in this case, with transporting illegal aliens. Defendant claimed that he had innocently picked them up hitchhiking. Although six aliens had been discovered when defendant was arrested, three were deported prior to his trial.

The court of appeals reversed defendant's conviction on the ground that the deportations denied him due process and compulsory process. With regard to the importance of the witnesses to the defendant's case, the court declared, "[w]e decline to indulge in any speculation that the interviews would, or would not, have been fruitful to the defense." 450 F.2d at 5.[5]

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[4] There is a considerable number of unreported district court cases in which indictments have been dismissed, in whole or in part, on the authority of *Mendez-Rodriguez*. The reported cases in addition to this one and *Mendez-Rodriguez* are *United States* v. *Gonzalez*, 617 F.2d 1358 (9th Cir. 1980); *United States* v. *Calzada*, 579 F.2d 1358 (7th Cir.), cert. dismissed, 439 U.S. 920 (1978); *United States* v. *Tsutagawa*, 500 F.2d 420 (9th Cir. 1974); *United States* v. *Winnie Mae Mfg. Co.*, 451 F. Supp. 642 (C.D. Cal. 1978); *People* v. *Mejia*, 57 Cal. App. 3d 574, 129 Cal. Rptr. 192 (1976) (dismissal appropriate when state prosecutors fail to take steps to halt federal deportation of witness).

[5] Subsequent decisions by the Ninth Circuit dealing with the general situation of deported illegal aliens who had been present at the scene of a crime appeared to modify *Mendez-Rodriguez* by requiring some showing of "prejudice." Thus, in *United States* v. *Sanchez-Murillo*, 608 F.2d 1314, 1318 (9th Cir. 1979), the court held that "[a] bare assertion that '[the deported alien] was an eyewitness to some of the alleged conspiratorial criminal activity, and might have exonerated the defendant'" is insufficient to raise a *Mendez-Rodriguez* claim. See also *United States* v. *Martinez-Morales*, 632 F.2d 112, 114 (9th Cir. 1980); *United States* v. *McQuillan*, 507 F.2d 30, 33 (9th Cir. 1974). The decision in this case demon-

The Seventh Circuit in *United States* v. *Calzada*, 579 F.2d 1358, 1362 (7th Cir.), cert. dismissed, 439 U.S. 920 (1978), following the lead of *Mendez-Rodriguez* and the Ninth Circuit's later decision in *United States* v. *Tsutagawa*, 500 F.2d 420 (9th Cir. 1974), upheld dismissal of several defendants' indictments without requiring any showing of "prejudice to his or her case * * *." The court reasoned that "[s]ince no defendant could ever be able to show with any degree of assuredness what a witness whom he has never interviewed might say on his behalf, a demonstration of prejudice will be impossible." 579 F.2d at 1362.[6]

The Fifth Circuit, on the other hand, has expressly adopted a requirement that the defendant be able to demonstrate genuine prejudice to his case caused by the government's actions. *United States* v. *Avila-Dominguez*, 610 F.2d 1266 (5th Cir. 1980). Discuss-

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strates, however, that the Ninth Circuit for all practical purposes has returned to its automatic reversal rule in *Mendez-Rodriguez*.

[6] Both *Mendez-Rodriguez* and *Calzada* were decided over vigorous dissenting opinions. In *Mendez-Rodriguez* Judge Kilkenny noted that "[t]he record is completely devoid of anything which would suggest that the testimony of any one, or more, of the deported persons would have been helpful to appellant." *United States* v. *Mendez-Rodriguez*, *supra*, 450 F.2d at 6 (Kilkenny, J., dissenting). In *Calzada*, Judge Cummings suggested that "it does not seem too much to require that [the defendants] offer at least a plausible theory, perhaps with some degree of consistency with testimony from other witnesses * * * of how any added witness might be more helpful than a prosecutor's offered stipulation of non-identification." *United States* v. *Calzada*, *supra*, 579 F.2d at 1365 (Cummings, J., dissenting). See also *United States* v. *Perlman*, 430 F.2d 22 (7th Cir.), cert. denied, 400 U.S. 832 (1970).

ing specifically the Ninth and Seventh Circuit decisions, the Fifth Circuit announced that "[w]e disagree, however, with the automatic reversals and indictment dismissals which occurred in those cases." *Id.* at 1269. See also *United States* v. *Henao*, No. 80-5145 (5th Cir. Aug. 7, 1981), slip op. 10081; *United States* v. *Arredondo-Morales*, 624 F.2d 681, 685-686 (5th Cir. 1980).

The decision of the Ninth Circuit in the instant case, although fully consistent with the Seventh Circuit's holding in *Calzada*, conflicts fundamentally with the analysis of the Fifth Circuit in *Avila-Dominguez*. The "conceivable benefit" test as applied in this case is nothing more than a thinly-veiled return to the automatic reversal rule adopted in *Mendez-Rodriguez*.

It simply defies credulity to hold, as the court of appeals did in this case, that respondent's defense was prejudiced as a result of the return to Mexico of the two illegal aliens. During the proceedings in the district court, respondent never demonstrated how he had been prejudiced by the release of the witnesses, nor did he ever make an offer of proof as to how any of the missing witnesses could have benefited his defense. In fact, no defense was offered in the district court, and respondent has at no time claimed, let alone demonstrated, what the absent "witnesses" would have testified to that might have been exculpatory or in any way useful to his defense.[7] The evidence of guilt demonstrated by the

[7] The present situation is somewhat analogous to that in which a defendant moves for a severance so that a co-defendant, who would be unavailable as a witness at a joint trial because of the self-incrimination privilege, may testify in the movant's defense. A motion for such relief must be supported by a relatively specific showing that the co-defendant can and will supply material evidence on the movant's behalf in order to obtain a severance of his trial. See,

circumstances of his apprehension and by his post-arrest admissions was overwhelming. Compare *United States* v. *Arredondo-Morales*, *supra*, 624 F.2d at 686.

Under the reasoning of the court in this case, only defendants with wholly unimaginative lawyers will fail to have their indictments dismissed whenever any illegal alien is deported who was present at the time a crime was committed. It is therefore impossible to reconcile the interpretation of the due process and compulsory process clauses presently employed by the Seventh and Ninth Circuits with that adopted by the Fifth Circuit. This conflict among the courts of appeals over an issue of both constitutional and practical significance warrants review by this Court.

2. The court of appeals' decision is inconsistent with the principles enunciated in several decisions of this Court.

a. It is well settled that the government has no absolute obligation to make available to a criminal defendant every witness he may wish to have testify. See *McCray* v. *Illinois*, 386 U.S. 300, 311 (1967); *Roviaro* v. *United States*, 353 U.S. 53 (1957). Instead, as this Court reasoned in an analogous context in *Roviaro* (*id.* at 60-61, 62):

> The problem is one that calls for balancing the public interest * * * against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must

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e.g., *United States* v. *Bumatay*, 480 F.2d 1012, 1013 (9th Cir. 1973); *Brown* v. *United States*, 375 F.2d 310, 317 (D.C. Cir. 1966), cert. denied, 388 U.S. 915 (1967). A similar showing must be made before a defendant receives a continuance because a witness is not present for trial. See, *e.g.*, *United States* v. *McPhatter*, 473 F.2d 1356, 1358 (5th Cir. 1973); *Warden* v. *United States*, 391 F.2d 747 (10th Cir. 1968). At least as much should be required before a defendant is granted the ultimate windfall of dismissal of an indictment.

> depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

In *Roviaro* the Court held [8] that the prosecution was obligated "to disclose the identity of an undercover employee who had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness * * *." *Id.* at 55.

The court of appeals' analysis in the instant case stands in striking contrast to that employed in *Roviaro*. This Court in *Roviaro* meticulously analyzed the importance of the absent witness to the carefully delineated alibi defense presented in that case. It was only after satisfying itself that the witness was "critical" [9] to the defendant's case that the Court allowed the government's interest in protecting its

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[8] The Court in *Roviaro* did not specify the basis for its decision. Subsequently, in *McCray* v. *Illinois*, 386 U.S. 300, 309 (1967), the Court described *Roviaro* as based on federal supervisory powers. There is no reason to suppose that the Court's analysis would have been different had the case been decided under the Due Process or Compulsory Process Clauses. The purpose of those requirements is not simply to assure that defendant can require all witnesses to attend his trial. Instead, as this Court has made clear, it is to enable the defendant "to present a defense" so that the trier of fact "may decide where the truth lies." *Washington* v. *Texas*, 388 U.S. 14, 19 (1967). Thus, the Due Process and Compulsory Process Clauses require an analysis of the defendant's need for the witness balanced against the government's interest in not having to assure his presence.

[9] This was how the Court subsequently described the informant in *Roviaro*. See *Branzburg* v. *Hayes*, 408 U.S. 665, 698 (1972).

sources to be overborne. The court of appeals in the instant case took the more drastic step of dismissing the prosecution solely on the basis of speculation that the testimony of the deported aliens might offer a "conceivable" benefit to the defense (App. A, *infra*, 5a-7a).

In addition, the court in the instant case totally disregarded the substantial governmental interest in reducing "the great burden and expense of detaining and housing alien witnesses * * *." *United States* v. *Avila-Dominguez, supra*, 610 F.2d at 1269. Affidavits submitted to the district court by the United States showed that retention of illegal aliens as material witnesses has become a serious problem. For the 1979 fiscal year in the Southern District of California alone, 5,097 illegal aliens were held as material witnesses. The total number of prisoners was 11,552. This means that of all of the prisoners detained by the United States Marshal in the Southern District of California almost *half* were being held solely as material witnesses. The average length of their detention was 5.37 days, but detentions in excess of three months were not uncommon.[10]

The court of appeals also has ignored the substantial interest of both the government and the aliens

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[10] These data were attached as Exhibit B to the Government's Response and Opposition to Defendant's Notice of Motion to Dismiss Indictment filed with the district court and therefore are part of the record in this case.

While the data do not reflect the exact impact of *Mendez-Rodriguez* on the government's resources, it is surely fair to say that many of the illegal aliens were retained solely because of *Mendez-Rodriguez* rather than because of any judgment that they in fact possessed material evidence that might be important to a criminal prosecution, and many more will have to be detained in the future for fear of violating the "conceivable benefit" test set out in this case.

themselves in humane treatment of illegal aliens who have been apprehended.[11] Unless there is some basis for concluding that an alien can provide "critical" evidence to a defendant, it seems fundamentally unfair to incarcerate him for any period of time at all.

Finally, the court of appeals disregarded the fact that in this case the Assistant United States Attorney made a careful assessment of whether all three illegal aliens who were apprehended after fleeing from the car respondent was driving had to be burdened by detention pending respondent's trial. Based on the circumstances surrounding the arrest and respondent's own admissions, the Assistant United States Attorney reasonably concluded that no useful purpose would be served by incarcerating all three illegal aliens. He accordingly directed that only the one alien respondent was charged with transporting be detained, and he authorized the release of the other two. The court in its opinion ignored the reasonableness of the government's approach to protecting the important interests implicated in this case.

In sum, the court of appeals has seriously erred in its weighting of both sides of the scale in this case. On the one hand, it indulges in the rankest speculation regarding the "conceivable benefit" that the re-

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[11] The courts of appeals have acknowledged the interest of at least some illegal aliens in being returned promptly to their native lands. Thus, the Ninth Circuit upheld the immediate release of juveniles in *United States* v. *Carrillo-Frausto*, 500 F.2d 234, 235 (9th Cir. 1974). Similarly, the release of a mother and her two children was upheld in *United States* v. *Avila-Dominguez, supra*, 610 F.2d at 1268, in part because there were inadequate facilities for their detention. See also *United States* v. *Henao*, No. 80-5145 (5th Cir. Aug. 7, 1981), slip op. 10082; *United States* v. *Calzado, supra*, 579 F.2d at 1361.

leased aliens' testimony might have offered this defendant—who has indeed never even suggested that he was not guilty of the offense with which he was charged and which was proved by overwhelming evidence. On the other, the court wholly discounts the costs, both human and economic, of detaining large numbers of alien "witnesses," most of whom never would be called upon to give testimony, some of whom may be incarcerated as long as or longer than the defendants for whose cases they are held, and whose incarceration contributes materially to the already severe problems of jail overcrowding that plague this country.[12]

b. Even if the court's analysis in finding that respondent's rights had been violated could be reconciled with the approach taken in analogous cases like *Roviaro*, its determination that the only appropriate remedy for that violation was dismissal of the indictment is fundamentally at odds with principles announced by this Court in prior cases. Just this past Term the Court held in a right to counsel case that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *United States* v. *Morrison*, No. 79-395 (Jan. 13, 1981), slip op. 4. See also *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977); *United States* v. *Marion*, 404 U.S. 307, 324-325 (1971).

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[12] In *United States* v. *Tsutagawa*, *supra*, for example, the defendants were foremen on a farm where 39 aliens were being harbored. Four of these were retained as potential trial witnesses, while the other 35 were returned to their countries of origin. The court held that the prosecution had to be dismissed because all the illegal aliens had not been detained.

The Court announced that the appropriate "approach" is "to identify and then neutralize the taint by tailoring suitable relief appropriate in the circumstances to assure * * * a fair trial." *United States* v. *Morrison*, *supra*, slip op. 4. The court in the instant case did not even bother to consider whether the stipulations offered by the government (see note 3, *supra*) or some other measures [13] might have sufficed to guarantee respondent a fair trial. Instead, the court simply adopted the most drastic remedy available, thereby increasing "to an intolerable degree interference with the public interest in having the guilty brought to book." *United States* v. *Blue*, 384 U.S. 251, 255 (1966). This result, in substantial conflict with this Court's prior holdings, merits review by this Court.

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[13] The issue presented by this case is not unlike the situation in which a witness peculiarly within the control of one party is not produced to testify at trial. This is dealt with by allowing the finder of fact to draw an adverse inference against the non-producing party. See generally 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 17.19 (1977). The courts of appeals that have ordered dismissals of indictments have never explained why this less drastic approach would not ordinarily be adequate to rectify any problems created by the good faith deportation of illegal aliens who are not known to the government to possess material exculpatory evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

CARTER G. PHILLIPS
Assistant to the Solicitor General

CAROLYN L. GAINES
Attorney

SEPTEMBER 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 80-1573

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICARDO VALENZUELA-BERNAL,
DEFENDANT-APPELLANT

Argued and Submitted April 9, 1981

Decided June 5, 1981

Appeal from the United States District Court
for the Southern District of California

Before PREGERSON and REINHARDT, Circuit Judges, and HARDY,* District Judge.

PREGERSON, Circuit Judge:

Ricardo Valenzuela-Bernal was indicted for transporting illegal aliens. He moved to dismiss the indictment on the grounds that the Government violated his Fifth and Sixth Amendment rights by deporting several alien eyewitnesses without affording him an opportunity to interview them. The district court denied his motion; Bernal was convicted. We reverse.

FACTS

Valenzuela-Bernal (Bernal), a Mexican citizen, entered the United States without inspection on March 23, 1980. After his entry, Bernal was picked up by

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* The Honorable Charles L. Hardy, United States District Judge for the District of Arizona, sitting by designation.

a "pollero" (a professional alien smuggler) and taken to a house in Escondido, California, where Bernal remained for six days. On March 30, Bernal, as the driver, and five other persons left the house by car en route to Los Angeles. As the car approached Temecula, California, Bernal, and presumably the passengers, saw a manned Border Patrol checkpoint. Bernal slowed the car to about five miles per hour. The border patrol agent spotted people lying on the floor of the car and signaled Bernal to stop. Bernal accelerated and the border patrol agents then pursued him. After a high speed chase on Interstate 15, Bernal stopped the car. He and the other occupants scrambled out of the car and took off in different directions. Bernal was immediately caught and arrested. All but two of the passengers were arrested shortly thereafter.

After his arrest, Bernal made a statement to the Border Patrol. When asked why he did not stop at the checkpoint, Bernal said:

> Well, I did stop but since I was bringing the people I already knew that I had had it. Too late, it was done.

At this time the Border Patrol had a total of four aliens in custody: Bernal and three of his passengers. The patrolmen interrogated all of the passengers, and, according to the patrolmen, all passengers testified that the defendant was the driver. They said nothing exculpatory about him. After discussing the case with an Assistant United States Attorney, the Border Patrol detained one passenger, Romero-Morales, and deported the other two to Mexico.

Bernal was indicted on one count of transporting an illegal alien, Romero-Morales, in violation of 8 U.S.C. § 1324(a)(2). Bernal attempted but failed

to secure the appearances of the deported alien witnesses at his trial. He then moved to dismiss the indictment on the grounds that the Government's deportation of the alien witnesses violated his Fifth Amendment right to due process and Sixth Amendment right to call and confront witnesses. The trial judge denied Bernal's motion. After a bench trial on stipulated facts, Bernal was found guilty as charged and sentenced to five years in prison, of which all but 179 days were suspended.

DISCUSSION

Bernal was convicted of violating 8 U.S.C. § 1324 (a)(2) which prohibits the knowing transportation of any illegal alien who has been in the United States for less than three years. Bernal argues that the district court erred in denying his motion to dismiss the indictment. He contends that the district court should have applied the doctrine enunciated in *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971), to this case.

In *Mendez-Rodriguez*, the defendant was indicted for transporting seven illegal aliens. The Government detained three aliens and deported the others to Mexico without affording the defendant an opportunity to interview them. At trial the defendant testified that he was unaware that the passengers in his car were illegal aliens. The three aliens testified that they were Mexican nationals, who had entered this country without inspection, and that the defendant stopped his car and gave them a ride. Mendez-Rodriguez was convicted. In reversing his conviction, we held that the Government's action in placing potential alien witnesses beyond the court's subpoena power before the defendant was afforded

an opportunity to interview and subpoena them violated the defendant's Fifth Amendment right to due process and Sixth Amendment right to compulsory process. The considerations prompting this decision were more fully explained in *United States* v. *Tsutagawa*, 500 F.2d 420 (9th Cir. 1974):

> The thrust of *Mendez-Rodriguez* is to prevent the basic unfairness of allowing the government to determine which witnesses will not help either side and then to release those witnesses, for all practical purposes, beyond the reach of the defendant. The vice lies in the unfettered ability of the government to make the decision unilaterally. A defendant has the right to formulate his defense uninhibited by government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense.

Id. at 423 (citations omitted).

The *Mendez-Rodriguez* doctrine sweeps broadly. As the dissent in that case pointed out, the court imposed no requirement of government misconduct or negligence before dismissal of an indictment is warranted. 450 F.2d at 6. Nor is a defendant required to show specific prejudice caused by the unavailability of the alien eyewitnesses. *Id.* at 5. In fact, the defendant in *Mendez-Rodriguez* conceded that he was unable to show that the missing witnesses would have offered testimony favorable to the defense. We found the defendant's concession

> understandable in view of the fact that appellant was, by Government action, deprived of the opportunity to interview said witnesses. Appellant

> couldn't know what these witnesses might say, if anything. We are in the same position as the appellant. We decline to indulge in any speculation that the interviews would, or would not, have been fruitful to the defense.

450 F.2d at 5.

This court, in applying *Mendez-Rodriguez*, however, has consistently emphasized that unless a defendant could "conceivably benefit" from the deported witness's testimony, the absence of the witness, brought about by the Government, is not a denial of due process warranting dismissal or reversal. *United States* v. *Gonzalez*, 617 F.2d 1358, 1363 (9th Cir.), *cert. denied sub nom. Patel* v. *United States*, —— U.S. ——, 101 S.Ct. 268, 66 L.Ed.2d 129 (1980); *United States* v. *Orozco-Rico*, 589 F.2d 433, 435 (9th Cir. 1978), *cert. denied*, 440 U.S. 967, 99 S.Ct. 1518, 59 L.Ed.2d 783 (1979). The conceivable benefit in *Mendez-Rodriguez* stemmed from the fact that the deported aliens were eyewitnesses to, and active participants in, the crime charged, so that there was a strong possibility that they could have provided material and relevant evidence concerning the events constituting the crime. *See United States* v. *McQuillan*, 507 F.2d 30, 32-33 (9th Cir. 1974).[1] Conversely, where a missing deported alien

[1] Some of our decisions discuss the "conceivable benefit" test in terms of a failure to establish prejudice from the absence of the deported alien witness. Nevertheless, the test remains the same: whether the defendant could conceivably benefit from the missing witness's testimony. Where we have held that *Mendez-Rodriguez* required a dismissal of the indictment, we concluded that the missing witnesses may have been able to testify in support of the accused. See *United States* v. *Gonzales*, 617 F.2d 1358 (9th Cir. 1980); *United*

was not an eyewitness to the offense, we have been unwilling to assume that the alien's testimony could conceivably benefit the defendant.[2]

States v. *Tsutagawa*, 500 F.2d 420 (9th Cir. 1974). Where we did not find that *Mendez-Rodriguez* warranted the dismissal of the indictment we held that the Government's actions were not unilateral actions depriving the defendant of access to the witness. *See United States* v. *Gonzales*, 617 F.2d 1358 (9th Cir. 1980); *United States* v. *Hernandez-Gonzalez*, 608 F.2d 1240 (9th Cir. 1979); *United States* v. *Ballesteros-Acuna*, 527 F.2d 928 (9th Cir. 1975); *United States* v. *Francisco-Romancia*, 503 F.2d 1020 (9th Cir. 1974), *cert. denied*, 420 U.S. 910, 95 S.Ct. 831, 42 L.Ed.2d 840 (1975); *United States* v. *Carrillo-Frausto*, 500 F.2d 234 (9th Cir. 1974); *United States* v. *Lomeli-Garnica*, 495 F.2d 313 (9th Cir. 1974); *United States* v. *Verduzco-Macias*, 463 F.2d 105 (9th Cir.), *cert. denied*, 409 U.S. 883, 93 S.Ct. 173, 34 L.Ed.2d 139 (1972); *United States* v. *Peyton*, 454 F.2d 213 (9th Cir. 1971). The only gloss that has been added to the *Mendez-Rodriguez* doctrine is that if the defendant had a real opportunity to question a witness but failed to do so, then the argument that defendant has been deprived of Fifth or Sixth Amendment rights is unavailing even if all the elements of the *Mendez-Rodriguez* doctrine are otherwise present. *See United States* v. *Costillo*, 615 F.2d 878 (9th Cir. 1980); *United States* v. *Valdez*, 594 F.2d 725 (9th Cir. 1979); *United States* v. *Romero*, 469 F.2d 1078 (9th Cir. 1972), *cert. denied*, 410 U.S. 985, 93 S.Ct. 1512, 36 L.Ed.2d 182 (1973). In this case the defendant was not given an opportunity to interview the missing alien witnesses before their deportation.

[2] *See, e.g., Gonzales* (missing alien not eyewitness to the offense; *Mendez-Rodriguez* not controlling); *United States* v. *Martinez-Morales*, 632 F.2d 112 (9th Cir. 1980) (missing alien not potential witness to criminal act; *Mendez-Rodriguez* not controlling); *United States* v. *Sanchez-Murillo*, 608 F.2d 1314 (9th Cir. 1979) (no evidence that missing alien, who was not present at defendant's arrest, witnessed any of the acts of which defendant was charged; *Mendez-Rodriguez* not controlling); *United States* v. *Castellanos-Machorro*, 512 F.2d 1181 (9th Cir. 1975) (no evidence that the released aliens

Application of the *Mendez-Rodriguez* doctrine requires reversal of the district court's decision. As in *Mendez-Rodriguez*, the Government here selected certain aliens for detention while returning others to Mexico; the deported aliens were eyewitnesses to, and active participants in, the crime charged, thus establishing a strong possibility that they could have provided material and relevant information concerning the events constituting the crime. Moreover, the defendant asserted the defense that he was unaware of his passengers' status as illegal aliens. This defense might have been corroborated by the missing witnesses.

We cannot accept the Government's argument that strict application of the *Mendez-Rodriguez* doctrine has never been followed in this circuit. A survey of the *Mendez-Rodriguez* progeny shows that we have adhered to the essential elements of the original case. Those elements are (1) unilateral Government action denying a defendant access to a witness; and (2) prejudice, *i.e.*, loss of a conceivable benefit to the defendant from the missing witness's testimony.[3]

---

witnessed the acts of which the defendants stood accused; *Mendez-Rodriguez* not controlling); *United States* v. *McQuillan*, 507 F.2d 30 (9th Cir. 1974) (missing aliens did not witness the acts charged in the indictment; *Mendez-Rodriguez* not controlling).

[3] *United States* v. *Hernandez-Gonzalez*, 608 F.2d 1240 (9th Cir. 1979), did not modify the "conceivable benefit" test. In *Hernandez-Gonzalez*, the defendant was convicted of transporting illegal aliens in violation of 8 U.S.C. § 1324(a)(2). At trial the Government was able to produce only four of the five aliens who were in the defendant's car when it was stopped by the border patrol. The fifth escaped from Government custody by trickery. The defendant challenged his conviction on the ground that the absence of the fifth witness de-

Alternatively, the Government argues that Bernal's statement to the Border Patrol was a confession to the crime charged, and hence no defense theory could have been corroborated by the returned witnesses. We do not agree. Nowhere in Bernal's statement does he acknowledge that the passengers in the car were aliens who had been in the United States for less than three years. Even inferring from Bernal's statement that Bernal knew the passengers were aliens would merely place him on equal footing with the defendant in *Mendez-Rodriguez*, who also knew the hitchhikers were aliens. The crux of the case, rather, is whether Bernal knew the passengers were *illegal* aliens who had been in this country for less than three years. The Government never asked Bernal if he knew his passengers were illegal aliens, and nowhere in his statement does Bernal confess such knowledge. Nor did the district court find that Bernal had confessed to the knowing transportation of illegal aliens.[4] It is this knowledge

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prived him of his Fifth and Sixth Amendment rights. On appeal, we held that the missing witness was not unavailable due to unilateral Government action. We further stated by way of dictum that "equally significant" to the decision not to apply *Mendez-Rodriguez* was the "remote possibility of prejudice" to the defendant. Our discussion of prejudice in that case, however, was unnecessary to the decision and therefore is not controlling.

[4] The government overlooks the distinction between a confession and an admission. A confession is a direct acknowledgement of guilt of the crime charged whereas an admission is a " 'statement of pertinent facts which, in connection with proof of other facts, tends to prove guilt of the crime charged.' " *United States* v. *Wertz*, 625 F.2d 1128, 1133 n.7 (4th Cir.), *cert. denied.* —— U.S. ——, 101 S.Ct. 278, 66 L. Ed.2d 136 (1980), *quoting United States* v. *Cobb*, 448 F.Supp. 886, 893 (D.S.C.), *aff'd* 568 F.2d 774 (4th Cir. 1977); *Gladden*

of the illegal status of the aliens which is essential to the crime charged.

CONCLUSION

The *Mendez-Rodriguez* doctrine applies to the facts of this case. The district court's denial of appellant's motion to dismiss the indictment is REVERSED.

REVERSED.

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v. *Unsworth*, 396 F.2d 373, 375 n.2 (9th Cir. 1968). In other words, if a statement "is only as to some of the facts which show guilt of the crime, it is characterized as an admission." J. McBaine, CALIFORNIA EVIDENCE MANUAL § 843, at 218 (2d ed. 1960). Bernal did not confess to transporting aliens with knowledge that they had illegally been in this country less than three years. At most, his statement establishes only one element of the crime—transporting—and is properly labeled an admission. *Gladden* v. *Unsworth*, *supra*; *United States* v. *Bernett*, 495 F.2d 943, 948 n.22 (D.C. Cir. 1974).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-1573

DC CR 80-0237 GT

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

RICARDO VALENZUELA-BERNAL,
DEFENDANT/APPELLANT

Appeal from the United States District Court
for the Southern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

A TRUE COPY
ATTEST
RICHARD H. DEANE
Clerk of Court

by: /s/ Oscar Tagle
Deputy Clerk

Filed and entered June 5, 1981.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

BEFORE THE HON. GORDON THOMPSON, JR.,
JUDGE PRESIDING

No. 80-0237

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RICARDO VALENZUELA-BERNAL, DEFENDANT

MOTION HEARING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JUNE 12, 1980

SUPPLEMENTAL RECORD ON APPEAL

Reported By: BARBARA LYNCH, CSR 2815
Official Reporter
#4N-10, U.S. Courthouse
940 Front Street
San Diego, California 92189
Telephone: (714) 239-7056

[42] * * * First of all, the defendant hasn't shown any prejudice. He has confessed. We've heard from the material witnesses who will be testifying at the trial.

So as to the charge with which he's charged, his sixth amendment rights are clearly not violated. It wouldn't make any difference what those other witnesses said if in fact the defendant is only going to be charged with the one witness who's here, because he's confessed to the transporting of these individuals, including the defendant that's here.

Let me see the case file, Mr. Clerk, will you please?

I think that not only is there no showing made by the defendant, but even if all the witnesses said or in some way exculpated the defendant who has already admitted driving, as has the witness who is the defendant, at best you would have a creation of a conflict in the evidence, the conflict being that between the passengers in the automobile and the defendant's own confession.

Of course, as Mr. Doyle testified, if for some reason the confession becomes suppressable and is suppressed, then I think that he would have to prove his case against the one witness without the obvious benefit of the confession, but in this case, if we're looking at prejudice, and if that's what those two cases say, which I haven't read, [43] but I will, then I concede that *Mendez-Rodriguez* would not be applicable.

First of all, *Mendez-Rodriguez* was decided based upon the facts, as Mr. Doyle pointed out, relative to this hitchhiking defense. It would have been much wiser for the circuit court to limit the decision to the facts of the case, because when you paint a legal rule with a broad brush, you're inviting just what

has been occurring over the past few years, and that is to cause a chipping away at what was or what amounts to a rule which is the figment of some idea of a judge of the circuit court, or more than one judge of the circuit court, but which is not developed to a point where the consequences of the rule are sought out properly. And it's true, of course—it's not limited to the circuit court—it's true of the Supreme Court in many cases. It's difficult at best for either court to decide a case on the factual issues.

But when I sit on that circuit court—and I've been there four times already this year—and even when I decide cases here, civil cases particularly, I decide them on their facts without painting with broad brushes for that very reason, and sometimes you have to hold the reins on some of these judges to do that, because there is a tendency to say, as Mr. Williamson says, that it is a violation of the sixth amendment right and a violation of his due processes, [44] and it rises to constitutional dimension, and all those catchy little phrases which are cute, but which really tend to cause more litigation, create more litigation than they deter it, and I think it would be—it would have been much wiser for both in *Tsutagawa*, which I decided and which the 9th Circuit upheld because of the *Mendez-Rodriguez* situation on the facts—on *Tsutagawa* it was facts—I felt that there was a substantial prejudice. But that really should have been part of *Mendez-Rodriguez* to say, and it was brought up that the defendant was not prejudiced. Clearly the defendant was prejudiced in this case because he was using this hitchhiking defense. To use any defense Mr. Bernal is going to have to repudiate his own confession, which seems to me to be somewhat unlikely, and I suppose it's a balancing test.

The issue, it seems to me, would be if he does not contest his confession, which thus far he has not done, or its voluntariness, then I think one would have to say that Mendez-Rodriguez would be inapplicable.

If, on the other hand, he contests his confession and attempts at some point in time to repudiate it, there may be a constitutional issue, but that cannot be decided until such time as there is an individual defense developed for Mr. Bernal on which the court can rule. This defense would have to be some theory that would clearly establish [45] that the witnesses who were released would be necessary thereto. I can't rule on what has not been presented to me.

But insofar as what has been presented to me, I do not think that there has been a violation of due process, even taking into consideration the Mendez-Rodriguez case, which I would have written confining it to its facts, and which I think eventually will be the case with these new cases coming down, or as I did confine *Tsutagawa* to the facts, and I think that's probably why it was affirmed.

So I'm going to deny the motion on the facts of this case at this time on this indictment. I can't make it any narrower than that, I don't think. If I could, I would.

* * * * *

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF CALIFORNIA

No. 80-0237

UNITED STATES OF AMERICA

v.

RICARDO VALENZUELA-BERNAL (1)

On this 12th day of August, 1980 came the attorney for the government and the defendant appeared in person and by counsel, Craig Weinerman, of Federal Defenders.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a finding of guilty has been convicted of the offense of illegal transportation of aliens in violation of 8 USC 1324(a)(2) as charged in the indictment in 1 count, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years, provided, however, that pursuant to 18 USC 3651 as amended, said defendant shall be confined in a jail-type or treatment institution for a period of one hundred seventy-nine (179)

days execution of the remainder of sentence is suspended and defendant is placed on probation for a period of five (5) years, on condition that he obey all laws, Federal, State, and Municipal, that he comply with all lawful rules and regulations of the Probation Department, that if he is allowed to re-enter the United States he report to the Probation Department within 24 hours of his legal entry and that he report to the Probation Department all vehicles which he owns or has an interest in.

IT IS RECOMMENDED that the defendant be deported.

IT IS ORDERED that probation supervision is waived while the defendant remains in Mexico.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge
Filed: August 12, 1980
WILLIAM W. LUDDY, Clerk

By: /s/ V. C. Mohler
V. C. MOHLER
Deputy Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 352695 598

Joint Appendix

Office - Supreme Court, U.S.
FILED
DEC 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-450

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

Petitioner

v.

RICARDO VALENZUELA-BERNAL

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 5, 1981
CERTIORARI GRANTED NOVEMBER 2, 1981

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-450

UNITED STATES OF AMERICA,

Petitioner

v.

RICARDO VALENZUELA-BERNAL

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Indictment, Filed April 1980	6
Motion to Dismiss, Filed May 1980	7
United States Marshal's Affidavit and Exhibits, Filed May 1980	17
Stipulation, Filed July 1980	22
Respondent's Statement at the Time of his Arrest	24
Transcript of Proceedings:	
(June 2, June 12, July 2, July 3, 1980)	30
Testimony of Enrique Romero Morales:	
Direct 11-15	36
15-16	38
16-22	39
Recross 22-23	44
Redirect 23	44

Transcript of Proceedings:—Continued Page

Testimony of George Fernandez:

Direct 32-38 46

Cross 38-40 50

Redirect 40 51

Testimony of John Andrew Boris:

Direct 40-45 52

Cross 45-47 55

Sentencing Hearing:

63-71 57

Supplemental Transcript of Proceedings:

(June 12, 1980) 62

Testimony of David C. Doyle:

Direct 4-18 63

Cross 18-25 73

Redirect 25-30 78

Recross 30-33 81

Summation:

35-38 84

Order allowing certiorari 87

RELEVANT DOCKET ENTRIES

Date	Proceedings
03/29/80	Defendant arrested (Doc: 2) (Dkt'd 04/01/80).
03/31/80	Filed magistrate complaint (MAG INFANTE) (Doc: 1) (Dkt'd 04/01/80).
	Arraignment on magistrate complaint held (MAG INFANTE) (Doc: 2) (Dkt'd 04/01/80).
	Preliminary examination set for 04/10/80 @ 10:00 AM (MAG INFANTE) (Doc: 2) (Dkt'd 04/01/80).
	Order surety/cash bail set in the amount of $5,000.00 (MAG INFANTE) (Doc: 2) (Dkt'd 04/01/80).
	Order surety/cash bail for material witness (es) set in the amount of $1,000.00 (MAG INFANTE) (Doc: 2) (Dkt'd 04/01/80).
	Bail hearing set for 04/10/80 @ 10:00 AM (for Mat Wits. Mat Wits detained pursuant to 18:3149.) (MAG INFANTE) (Doc: 2) (Dkt'd 04/01/80).
	Order CHLAD, MICHELE appointed for material witnesses (MAG INFANTE) (Doc: 3) (Dkt'd 04/01/80).
04/08/80	Bail hearing held (Bail review re material witness Enrique Romero-Morales modified to $1,000 P/S and $100. Cash deposit and sign of surety and INS to permit witness to reside in Ca during pendency of case and counsel to provide all parties with address and telephone number of witness.) (MAG INFANTE) (Doc: 4) (Dkt'd 04/08/80).
	Filed own recognizance bond in amount of $1,000.00 (Posted 4-5-80 with $100 Cash for material witness. Enrique Romero-Morales.) (MAG INFANTE) (Doc: 5) (Dkt'd 04/08/80).
04/09/80	Filed indictment (Doc: 6) (Dk't 04/10/80).
	Order corporate surety/cash bail set in the amount of $5,000.00 (Dkt'd 04/10/80).

Date	Proceedings
04/10/80	Arraignment held (Count 1) (Doc: 7) (Dkt'd 04/11/80).
	Defendant enters plea of not guilty (Count 1) (Doc: 7) (Dkt'd 04/11/80).
	Order case reassigned to JUDGE THOMPSON (MAG INFANTE) (Doc: 7) (Dkt'd 04/11/80).
	Hearing on pre-trial motions or trial setting continued to 04/14/80 @ 8:30 AM (Count 1) (or status) (JUDGE THOMPSON) (Doc: 7) (Dkt'd 04/11/80).
	—O/H form to be filed by 4-14-80 (Doc: 7) (Dkt'd 04/11/80).
	Filed affidavit (re Materiality of M/W, Ct finds wit. to be material) (MAG INFANTE) (Doc: 8) (Dkt'd 04/11/80).
04/14/80	Trial date set for 06/03/80 @ 8:30 AM (Count 1) (JUDGE THOMPSON) (Doc: 9) (Dkt'd 04/14/80).
	Hearing on pre-trial motions set for 05/27/80 @ 1:30 PM (Count 1) (JUDGE THOMPSON) (Doc: 9) (Dkt'd 04/14/80).
05/22/80	Motion to dismiss filed (MOT#1) (Count 1) (t/w Statement of Facts and Points and authorities in support of. and Affid of Counsel.) (Doc: 10) (Dkt'd 05/23/80).
	Motion to dismiss hearing set for 06/02/80 @ 1:30 PM (MOT#1) (JUDGE THOMPSON) (Doc: 10) (Dkt'd 05/23/80).
05/27/80	Hearing on pre-trial motions set for 06/02/80 @ 1:30 PM (Count 1) (JUDGE THOMPSON) (Doc: 11) (Dkt'd 05/29/80).
05/28/80	Memorandum in opposition to motion to dismiss (MOT#1) (t/w Statement of facts and Memo of Points and Authorities.) (Doc: 12) (Dkt'd 05/30/80).
06/02/80	Motion to dismiss hearing held (MOT#1) (Swore Wits, Fld Exhibits.) (JUDGE THOMPSON) (Doc: 13) (Dkt'd 06/04/80).

Date	Proceedings
	Motion to dismiss taken under advisement (MOT#1) (JUDGE THOMPSON) (Doc: 13) (Dkt'd 06/04/80).
	Motion to dismiss ruling set for 06/12/80 @ 8:30 AM (MOT#1) (JUDGE THOMPSON) (Doc: 13) (Dkt'd 06/04/80).
	Trial date reset to 07/01/80) @ 8:30 AM (Count 1) (JUDGE THOMPSON) (Doc: 13) (Dkt'd 06/04/80).
06/04/80	Filed affidavit (Of Craig E. Weinerman.) (Doc: 14) (Dkt'd 06/06/80).
06/12/80	Motion to dismiss ruling held (MOT#1) (Swore wits, Fld Exhbits.) (JUDGE THOMPSON) (Doc: 15) (Dkt'd 06/13/80).
	Motion to dismiss denied (MOT#1) (JUDGE THOMPSON) (Doc: 15) (Dkt'd 06/13/80).
	Excludable delay due to hearings on Pretrial Motions began on 05/22/80 and ended on 06/12/80 (JUDGE THOMPSON) (Doc: 16) (Dkt'd 06/13/80).
07/01/80	Filed waiver of jury trial (and waiver of special findings of fact) (JUDGE THOMPSON) (Doc: 17) (Dkt'd 07/02/80).
	Trial begins—bench (Count 1) (JUDGE THOMPSON) (Doc: 18) (Dkt'd 07/02/80).
	Trial held-bench (Count 1) (stip fld, case submitted on stip) (JUDGE THOMPSON) (Doc: 18) (Dkt'd 07/02/80).
	Filed stipulation between the government and defendant (Judge THOMPSON) (Doc: 19) (Dkt'd 07/02/80).
	Trial ends-bench (Count 1) (JUDGE THOMPSON) (Doc: 18) (Dkt'd 07/02/80).
	Trial ruling set for 07/03/80 @ 8:30 AM (Count 1) (JUDGE THOMPSON) (Doc: 18) (Dkt'd 07/02/80).
	Bond exonerated (re M/W ENRIQUE ROMO) (JUDGE THOMPSON) (Doc: 18) (Dkt'd 07/02/80).

Date	Proceedings
07/02/80	Filed order releasing and exonerating bond of material witness(es) (ENRIGUE ROMERO-MORALES) (MAG INFANTE) (Doc: 20) (Dkt'd 07/03/80).
	Issued order releasing and exonerating bond of material witness (es) to U.S. Marshal (MAG INFANTE) (Doc: 20) (Dkt'd 07/03/80).
07/03/80	Trial ruling stricken (Count 1) (JUDGE THOMPSON) (Doc: 21) (Dkt'd 07/03/80).
	Court judgment of guilty (Count 1) (JUDGE THOMPSON) (Doc: 21) (Dkt'd 07/03/80).
	Order cause referred to the probation department for a pre-sentence investigation (Count 1) (Doc: 21) (Dkt'd 07/03/80).
	Sentencing set for 08/12/80 @ 9:30 AM (Count 1) (JUDGE THOMPSON) (Doc: 21) (Dkt'd 07/03/80). ord disbursing check for $100.00 to ELIAZAR ENRIQUES for bnd exon of M/W ENRIQUE ROMERO-MORALES (Dkt'd 07/03/80).
08/12/80	Sentencing of defendant (Count 1) (Impris for 5 yrs. 3651 JTI for 179 days. Exec. of balance sent susp & probation for 5 yrs unsuper upon deportation) JUDGE THOMPSON) (Dkt'd 08/13/80).
	Issued judgment and commitment to U.S. Marshal (Count 1) (Ent 8-13-80) (JUDGE THOMPSON) (Doc: 23) (Dkt'd 08/13/80).
08/15/80	Filed notice of appeal (Count 1) (APPL#1) (aty certification, order to prosecute appeal as a poor person, mailed not for filing designation of repts transcripts, of payment of docketing fees to USCA, of mot of Pre-Hrg conf re appeal set for 8-25-80 before Mag Infante, & ltr for acknowledgement of papers) (Doc: 24) (Dkt'd 08/18/80).
	Status hearing set for 08/25/80 @ 1:30 PM (MAG INFANTE) (Dkt'd 08/18/80).
	Notice of appeal and docket entries transmitted to USCA (APPL#1) (mailed) (dkt'd 08/18/80).
	Filed designation for record on appeal (of rtpt's transcript) (Doc: 25) (Dkt'd 08/18/80).

Date	Proceedings

08/26/80 Filed judgment and commitment returned executed, on 08/22/80 (JUDGE THOMPSON) (Doc: 26) (Dkt'd 08/27/80).

08/28/80 Filed designation for record on appeal (final designation of retps transcript) (Doc: 27) (Dkt'd 08/29/80).

09/08/80 - (APPL#1) (rec'd order for time shced from USCA) (Dkt'd 09/09/80).

09/24/80 Filed transcript of proceedings for 06/02/80 (, 6-12-80, 7-1-80, 7-3-80 motion hrgs, court trial, and sentencing by BARBARA LYNCH & LINDA LAURINO) (Dkt'd 09/24/80).

Filed transcript of proceedings for 08/12/80 (also filed on this day, but date just added list) (Dkt'd 10/07/80).

10/01/80 Filed transcript of proceedings for 06/12/80 (supplemental record on appeal by Barbara Lynch) (Doc: 28) (Dkt'd 10/07/80).

10/03/80 - (APPL#1) (issd clerks certificate of record on appeal) (Dkt'd 10/09/80).

10/09/80 - (APPL#1) (rec'd revised time sched) (Dkt'd 10/09/80).

10/24/80 Filed desgination for record on appeal (of clerk's record) (Doc: 29) (Dkt'd 10/27/80).

End of docket

Date	PROCEEDINGS from 10/24/80

10/24/80 Filed designation for record on appeal (of clerk's record) (Doc: 29) (Dkt'd 10/27/80).

11/07/80 Filed designation for record on appeal (appellee desig of clerks record) (Doc: 30) (Dkt'd 11/12/80).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

November 1979 Grand Jury

Criminal Case No. 80-00237-GT

UNITED STATES OF AMERICA, PLAINTIFF

v.

RICARDO VALENZUELA-BERNAL, DEFENDANT

INDICTMENT

Title 8, U.S.C., Sec. 1324(a)(2)—
Illegal Transportation of Aliens

The Grand Jury charges:

On or about March 29, 1980, within the Southern District of California, defendant RICARDO VALENZUELA-BERNAL knowing that an alien, namely, Enrique Romero-Morales, was then in the United States in violation of law and having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law; in violation of Title 8, United States Code, Section 1324(a)(2).

DATED: April 9, 1980.

A TRUE BILL:

/s/ Walter W. Stein
Foreman

/s/ M. James Lorenz, for
MICHAEL H. WALSH
United States Attoreny

DCD:clm
4/8/80

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

(HON. GORDON THOMPSON, JR.)

Case No. 80-00237-GT

UNITED STATES OF AMERICA, PLAINTIFF

v.

RICARDO VALENZUELA-BERNAL, DEFENDANT

Date: 27 May 1980

Time: 1:30 p.m.

NOTICE OF MOTION AND MOTION TO DISMISS INDICTMENT

TO: MICHAEL H. WALSH, UNITED STATES ATTORNEY and DAVID C. DOYLE, ASSISTANT UNITED STATES ATTORNEY

PLEASE TAKE NOTICE that on Monday, 2 June 1980, at 1:30 p.m., or as soon thereafter as counsel may be heard, the defendant, Ricardo Valenzuela-Bernal, by and through his appointed counsel, Craig E. Weinerman and Federal Defenders of San Diego, Inc., will move this Court for an order dismissing the Indictment in the above-entitled action.

MOTION

Pursuant to Rule 12 of the Federal Rules of Criminal Procedure and Fifth and Sixth Amendments of the United States Constitution, the defendant, Ricardo Valenzuela-Bernal, by and through his appointed counsel, moves this Court to order that all counts in the Indictment be dismissed.

This motion is based upon the instant motion, the attached statement of facts and points and authorities, the

attached affidavit of counsel, the attached exhibits, and any and all matters that may be brought to this Court's attention prior to or at the time of the hearing of this motion.

Dated: 20 May 1980

Respectfully submitted,

/s/ Craig E. Weinerman
CRAIG E. WEINERMAN
Federal Defenders of San Diego, Inc.
Attorneys for Defendant Valenzuela.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

(HON. GORDON THOMPSON, JR.)

Case No. 80-00237-GT

UNITED STATES OF AMERICA, PLAINTIFF

v.

RICARDO VALENZUELA-BERNAL, DEFENDANT

STATEMENT OF FACTS AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS INDICTMENT

I. FACTS

The following statement of facts, in part, are taken from the government report provided to defense counsel in this case. They are subject to contradiction and/or amplification at the time of the hearing of the motion.

On 29 March 1980 Defendant Ricardo Valenzuela-Bernal (hereinafter referred to as VALENZUELA) approached the stop sign at the Temecula Border Patrol checkpoint driving a 1967 Buick Skylark. Valenzuela approached the checkpoint slowly and apparently had a long string of cars behind him holding up traffic. When the vehicle arrived at the checkpoint Agent Fernandez motioned him over to secondary inspection but the vehicle went through the stop sign and accelerated to a high rate of speed. Agent Fernandez noticed several people lying in the back seat. Other Border Patrol agents pursued VALENZUELA on I-15 and near the off-ramp for Highway 79, the vehicle came to a stop and the driver and the front seat passenger exited the vehicle and ran west across the road. Agent Boris apprehended the driver and

the front seat passenger while Agent Gonzalez controlled the two remaining persons in the vehicle.

Discovery indicates that VALENZUELA waived his Constitutional rights and admitted entering the United States illegally and agreed to drive six other illegal aliens to Los Angeles. VALENZUELA stated that he sped away from the Temecula checkpoint and afterwards attempted to escape by foot as did the other six aliens.

Material witness Enrique Romero-Morales was interviewed and stated he entered the United States illegally on 28 March 1980 and that VALENZUELA was driving the 1967 Buick.

Material witnesses Alfredo Oliveras-Ochoa and Miguel Magana-Gayardo were voluntarily returned to Mexico by Border Patrol agents. Apparently, neither VALENZUELA nor his counsel were advised of this procedure.

Exhibit A, attached to this motion is a letter sent to Miguel Magana-Gayardo. This letter requests the presence of this material witness on 27 May 1980 and 3 June 1980. Mr. Magana was sent subpoenaes for the next two court dates and parole letters authorizing his entry into the United States to appear in court on those two dates. Exhibit B is a similar letter sent to material witness Alfredo Oliveras-Ochoa. Subpoenaes to testify and parole letters also were sent along with a letter requesting Mr. Oliveras appear in court. The letter which was sent to Mr. Oliveras along with the subpoenaes and parole letters is attached as Exhibit B. Exhibit C is the English translation of the letter sent to both Mr. Magana and Mr. Oliveras. Exhibit D is a copy of the letter sent to the Chief of Police of Mr. Oliveras's village in Mexico. Exhibit E is a copy of the letter sent to the Chief of Police in the village where Mr. Magana resides. An English translation of these two letters is attached as Exhibit F.

II. POINT AND AUTHORITIES

THE INDICTMENT SHOULD BE DISMISSED BECAUSE THE GOVERNMENT RELEASED AT LEAST TWO EYEWITNESSES TO THE ALLEGED OFFENSE, THEREBY RENDERING THEM UNAVAILABLE TO THE DEFENSE

This case is similar to *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971) where the government had returned three eyewitnesses to the offense for which the defendant was charged, to Mexico before the defendant had an opportunity to interview them. The court held that the government's conduct in making the witnesses unavailable was a denial of the defendant's Fifth Amendment rights to compulsory process for obtaining witnesses in his favor. In so holding, the court stressed the importance of the defendant's Sixth Amendment rights to have compulsory process available to him in order to obtain favorable witnesses. Citing the United States Supreme Court opinion in *Washington* v. *Texas*, 388 U.S. 14, 18-19 (1967) the Court stated:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." 450 F.2d at 4-5.

The court in *Mendez-Rodriguez* reasoned that the defendant was deprived of his due process rights when the government's act of deportation of the aliens put the witnesses outside the scope of the subpoena power of the district court. In the instant case, at least three

aliens were in the vehicle driven by the defendant. The evidence will show that the government has chosen to retain just one of these witnesses. Both of the released aliens were eyewitnesses to the alleged crime. The government, by its own *unilateral* action, has made three eyewitnesses unavailable to the defense. It appears both of the eyewitnesses were released to Mexico where the court cannot compel their presence at trial, and where the defendant, despite the efforts made, cannot locate and interview them. A lack of opportunity to interview these aliens denies the defense the opportunity to determine any details these eyewitnesses may know about the case, and what, if any, aid they can give the defendant. It appears the government has engaged in pretrial screening by interviewing one of the aliens, and being satisfied of the story told by him, decides to release the other witnesses. We will never know whether the other witnesses contradicted in any way the story told by the retained witness.

Again, attention is respectfully directed to the opinion in *Mendez-Rodriguez*, citing *Gregory* v. *United States*, 369 F.2d 185 (D.C. Cir. 1966), page 188:

> "Witnesses, particularly eyewitnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity to interview them. Here the defendant was denied that opportunity which, not only the statute, but elemental fairness and due process require that he have."
>
> "A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. Current tendency in the criminal law is in the direction of discovery of the facts before trial and elimination of surprise at trial. A related development in the criminal law is the requirement that the prosecution

> not frustrate the defense in the preparation of its case." (footnotes omitted)

By citing the above, the court in *Mendez-Rodriguez*, was demonstrating that the rationale for its holding is one of fairness and due process based on the notion that the government cannot, by its unilateral action, be permitted to deprive the defendant of his right to properly defend himself. In the case of *United States* v. *Tsutagawa*, 500 F.2d 420 (9th Cir. 1974), the Ninth Circuit further articulated the rationale of the *Mendez-Rodriguez* holding:

> "The thrust of *Mendez-Rodriguez* is to prevent the basic unfairness of allowing the government to determine which witnesses will not help either side and then to release those witnesses, for all practical purposes, beyond the reach of the defendant." (Citation omitted) "Here, the government placed witnesses, who may have been favorable to the appellee outside the power of our courts to require attendance. In *Mendez-Rodriguez* we held that this same act denied the accused due process because it interfered with his ability to defend himself from criminal charges." (Citation omitted) "A defendant has the right to formulate his defense uninhibited by the government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense." 500 F.2d at 423.

Clearly, in the instant case, the government has determined for the defense which witnesses will be permitted to assist him in the defense of his case. All the material witnesses came from same car driven by VALENZUELA, which indicates that they all witnessed the charged transaction. *See United States* v. *McQuillan*, 507 F.2d 30 (9th Cir. 1974). It appears from the record that six individuals were originally in the vehicle, three escaped, and three were apprehended by the Border Patrol. The

available pool of witnesses was already substantially narrowed due to the escape. It is unfair for the government to further screen the available pool of witnesses by unilaterally releasing two other witnesses to Mexico. *See United States* v. *Tsutagawa, supra.* Taking into consideration the pretrial screening of the witnesses which took place, the decision by the government to release two additional witnesses, one can only speculate that the government is setting up a challenge to the established rule in this circuit. If this is the move, the defense would suggest the actions are a result of bad faith by the government. *See United States* v. *Hernandez-Gonzales*, 608 F.2d 1240 (9th Cir. 1979).

The government should not be heard to say that the defendant has access to the released witnesses. The Ninth Circuit in *United States* v. *Tsutagawa, supra*, expressly rejected a similar argument by the government, stating:

> "*Mendez-Rodriguez* prevents the government from determining who will be a helpful witness for the accused. The accused (or here, prospective, accused) has a right to make that decision for himself, either by interviewing the potential alien witness or by waiving the right to do so." 500 F.2d at 423.

The government should not be heard to say that defendant VALENZUELA has not made a showing that the released witnesses would give testimony favorable to his case. The Court in *Mendez-Rodriguez*, directly addressed this issue, and stated that such a factor is of no importance:

> "Appellant concedes that he is unable to show that the witnesses in question would have offered testimony favorable to the defense. Such statement is understandable in view of the fact that appellant was, by government action, deprived of the opportunity to interview said witnesses. Appellant could not know what these witnesses might say, if any-

> thing. We are in the same position as the appellant. We decline to indulge in any speculation that the interviews would, or would not, have been fruitful to the defense." 450 F.2d at 5.

Subsequent decisions of the Ninth Circuit which distinguish themselves from the result affected in *Mendez-Rodriguez* have been careful to explain what factors must be present before a dismissal will result on the basis of the advanced Fifth and Sixth Amendment violations. In *United States* v. *McQuillan*, 507 F.2d 30 (9th Cir. 1974), Circuit Judge Barnes indicates what the *Mendez-Rodriguez* principle stands for:

1. It condemns the keeping of select alien eyewitnesses while returning others to Mexico without affording the defense an opportunity to interview them and ascertain whether any would be able to give testimony favorable to the defendant;
2. It is activated when there is little doubt that the aliens returned to Mexico were, in fact, eyewitnesses to the crime with which the defendant is charged;
3. It applies where the defendant advances a defense which might have been corroborated by the missing witnesses; and
4. It is a principle which excuses the defendant's failure to show that the testimony of the missing witnesses would have been helpful in light of the fact that the government has deprived the defendant of the opportunity to even interview them.

All such factors enunciated in the McQuillan decision are present in the instant case. Certainly, where the return alien material witnesses were present and obvious eyewitnesses to the alleged offense, the government cannot deprive the defendant of his only means of rebutting the anticipated testimony of the other witnesses by returning eyewitnesses to the alleged crime to Mexico before defense counsel had an opportunity to interview them. The testimony of the returned alien witnesses is

material and relevant insofar as they are eyewitnesses to the elements of the offense charged. Without proper opportunity to interview them and to compel their presence at trial, the defendant has been denied due process and his Sixth Amendment right to defend himself by the availability of compulsory process.

III.

CONCLUSION

Based on the foregoing, it is respectfully requested that the Indictment be dismissed.

Dated: 20 May 1980

Respectfully submitted,

/s/ Craig E. Weinerman
CRAIG E. WEINERMAN
Federal Defenders of San Diego, Inc.
Attorneys for Defendant Valenzuela.

AFFIDAVIT

STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO)

JAMES ROBERT LAFOON, being duly sworn, deposes and says:

1. As United States Marshall I have responsibility for the custody of material witnesses being held to testify in federal criminal trials.

2. The statistical information attached to this affidavit was prepared by my office and is true and correct to the best of my knowledge.

3. I have been informed by the warden of the Metropolitan Correctional Center (MCC) that during the most recent quarter it cost an average of $22.38 per day to house prisoners at the MCC.

/s/ James Robert Lafoon
JAMES ROBERT LAFOON
United States Marshal

SUBSCRIBED and SWORN to before
me this 28th day of May, 1980.

/s/ Winifred H. Wallace
WINIFRED H. WALLACE
Notary Public In And For Said
County And State

[SEAL]

EXHIBIT TO AFFIDAVIT OF U.S. MARSHAL

UNITED STATES MARSHALS SERVICE
SOUTHERN DISTRICT OF CALIFORNIA

Fiscal Year 1979

October 1, 1978 thru September 30, 1979

PRISONER STATISTICS

Total Aliens	FY 1979	Total Pris.	Non Aliens	% of Total	Aliens	% of Total	Mat. Wits.	Alien Smugg.	Illeg. Entry
22,783	Oct.	557	128	23%	429	77%	205	57	167
17,830	Nov.	470	102	22%	368	78%	119	54	195
16,646	Dec.	565	121	21%	444	79%	148	61	235
29,730	Jan.	1,077	142	13%	935	87%	477	133	325
34,436	Feb.	1,082	149	14%	933	86%	519	151	263
46,930	Mar.	1,213	159	13%	1,054	87%	495	157	402
42,120	Apr.	1,085	168	15%	917	85%	401	171	345
49,474	May	1,652	155	9%	1,497	91%	949	166	382
29,050	Jun.	1,245	173	14%	1,072	86%	687	133	252
41,311	Jul.	868	180	21%	688	79%	323	137	228
33,576	Aug.	799	136	17%	663	83%	325	139	199
20,521	Sep.	939	128	14%	811	86%	449	139	223
384,407		11,552	1,741	15%	9,811	85%	5,097	1,498	3,216
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)

(1) Total *Alien* apprehensions by U.S. Border Patrol-Chula Vista and Imperial Valley Sectors

(2) Total prisoners received by the U.S. Marshal-Southern District of California

(3) Total of *non alien* prisoners received by U.S. Marshal-Southern District of California

(4) Percentage of *non alien* prisoners of the total of 15% prisoners

(5) Total *alien* prisoners received by U.S. Marshal-Southern District of California

(6) Percentage of *alien* prisoners of the total of 85% prisoners

(7) Total Material Witnesses apprehended 5,097

(8) Total alien smugglers apprehended and charged 1,498

(9) Total Fraudulent Documents and Illegal Re-entry 3,216

UNITED STATES MARSHALS SERVICE
SOUTHERN DISTRICT OF CALIFORNIA

MALE MATERIAL WITNESSES

Note 1: The Table figures are the release records of the Metropolitan Correctional Center for Fiscal Year 1979.

Note 2: The average detention days for *all* Material Witnesses for El Centro was 5.37 days. This includes 395 taken to El Centro to relieve conditions in San Diego. Not all of the 395 were men.

Days In Custody	Material Witnesses	Days In Custody	Material Witnesses	Days In Custody	Material Witnesses
1	8	27	5	57	1
2	20	28	17	59	10
3	132	29	28	60	1
4	98	30	18	61	5
5	87	31	21	63	3
6	72	32	4	64	2
7	28	33	28	65	1
8	61	34	4	71	1
9	107	35	28	73	8
10	116	37	5	74	4
11	88	38	7	76	1
12	108	39	10	77	2
13	136	40	4	80	3
14	75	41	8	82	1
15	44	42	14	84	1
16	63	43	13	88	2
17	19	44	7	89	4
18	45	45	3	92	7
19	50	46	1	99	21
20	20	47	5	101	1
21	26	48	2	114	1
22	27	49	1	127	1
23	36	50	3	141	1
24	52	51	2	157	1
25	23	54	8	——	
26	20	56	5		

UNITED STATES MARSHALS SERVICE
SOUTHERN DISTRICT OF CALIFORNIA

FEMALE MATERIAL WITNESSES

Note 1: The Table figures are the release records of the Metropolitan Correctional Center for Fiscal Year 1979.

Note 2: The average detention days for all Material Witnesses for El Centro was 5.37 days. This includes 395 taken to El Centro to relieve conditions in San Diego. Not all of the 395 were women.

Days In Custody	Material Witnesses	Days In Custody	Material Witnesses	Days In Custody	Material Witnesses
1	4	18	26	40	2
2	19	19	14	43	3
3	42	20	6	44	3
4	35	21	7	47	3
5	20	22	3	54	1
6	12	23	13	56	3
7	8	24	4	57	1
8	12	26	15	59	3
9	36	28	8	62	2
10	11	29	3	63	1
11	21	30	1	64	1
12	19	31	4	67	2
13	20	32	3	69	1
14	6	33	5	77	1
15	16	34	2	78	1
16	10	36	5	88	2
17	7	39	1		

M. JAMES LORENZ
United States Attorney
HOWARD A. ALLEN
Assistant U.S. Attorney
Chief, Criminal Division
DAVID C. DOYLE
Assistant U.S. Attorney
United States Courthouse
940 Front Street, Room 5-N-19
San Diego, California 92189
Telephone: (714) 293-5675

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Criminal Case No. 80-0237-GT(1)

UNITED STATES OF AMERICA, PLAINTIFF

v.

RICARDO VALENZUELA-BERNAL, DEFENDANT

STIPULATION

IT IS HEREBY STIPULATED and agreed by and between the plaintiff, UNITED STATES OF AMERICA, through its counsel of record, M. James Lorenz, United States Attorney, and David C. Doyle, Assistant United States Attorney, and the defendant, RICARDO VALENZUELA-BERNAL, by and through his attorney, Craig Weinerman, as follows:

1. That if Enrique Romero-Morales were duly sworn and called as a witness, he would testify in accordance with his testimony at the motion hearing on June 2, 1980, contained in the attached transcript (Exhibit A).

2. That if George Fernandez were duly sworn and called as a witness, he would testify in accordance with his testimony at the motion hearing on June 12, 1980, contained in the attached transcript (Exhibit A).

3. That if John Andrew Boris were duly sworn and called as a witness, he would testify in accordance with his testimony at the motion hearing on June 12, 1980, contained in the attached transcript (Exhibit A).

SO STIPULATED.

DATED: July 1, 1980.

M. JAMES LORENZ
United States Attorney

HOWARD A. ALLEN
Assistant U.S. Attorney
Chief, Criminal Division

/s/ David C. Doyle
DAVID C. DOYLE
Assistant U.S. Attorney
Attorneys for Plaintiff
United States of America

/s/ Craig Weinerman
Counsel for Defendant

/s/ Ricardo Valenzuela-Bernal
RICARDO VALENZUELA-BERNAL
Defendant

ORDER

IT IS HEREBY ORDERED that the substance of paragraphs 1 through 3 above be accepted as the testimony of the witnesses listed in same if they were called to testify in the case of United States v. Ricardo Valenzuela-Bernal, Criminal Case No. 80-0237-GT.

SO ORDERED.

DATED: July 1, 1980.

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
Judge of the District Court

RESPONDENT'S STATEMENT AT TIME OF ARREST

Agent. (English) The following is a statement under oath taken by Investigator Herbert W. Banks of the Chula Vista Border Patrol Anti-Smuggling Office. The statement is being given by Ricardo Valenzuela Bernal. The driver of a vehicle that was involved in a high-speed chase on March the 29th, 1980 near Temecula, California. The date is March the 30th, 1980 and the time is 1:20 P.M.

Agent. (Spanish) Sir your conversation is being recorded on a tape recorder. Do you understand?

Wit. Yes, of course.

Ag. I am an officer of the Immigration and Naturalization Service of the United States. Authorized by law to administer oaths and to take statements with regards to the enforcement of the Immigration and Naturalization Laws of the United States. I wish to take a statement concerning your entry into the United States. Before we ask you any question you must understand your rights. You have the right to remain silent. Anything you say may be used against you in a court of law or in any Immigration or Administrative Proceeding. If you lie under oath you commit a crime of perjury punishable by law. You have the right to speak to an attorney, so he can advise you before we ask you any question and to have him present with you during questioning. If you do not have the money to hire an attorney, one can be provided for you before we ask you any question if you wish. If you decide to answer our questions now without having an attorney present you will always have the right to stop answering whenever you wish. You also have the right to stop answering whenever you wish until you can speak to an attorney. Do you understand?

Wit. Yes, of course.

Ag. Please stand up and raise your right hand. Are you willing to answer my questions under oath now?

Wit. Yes, sir.

Ag. Do you solemnly swear that all the statements that you are going to make will be the truth, the whole truth and nothing but the truth, so help you God?

Wit. Yes, I swear.

Ag. Please be seated. What is your complete and correct name?

Wit. Ricardo Valenzuela Bernal.

Ag. Where were you born?

Wit. Culiacan, Sinaloa.

Ag. When were you born?

Wit. February 18, 1958.

Ag. Of what country are you a citizen?

Wit. Of Mexico.

Ag. When did you enter the United States?

Wit. Sunday the 23rd.

Ag. March 23rd?

Wit. Uh huh.

Ag. Of this year?

Wit. This year.

Ag. How did you enter the United States?

Wit. I entered by way of the canal/channel.

Ag. By way of the canal/channel?

Wit. Uh huh.

Ag. Did you enter with your passport and visa or without passport and visa?

Wit. No, illegally.

Ag. Okay. What happened after your entry?

Wit. After my entry?

Ag. Yes.

Wit. We came to where there is a Safeway and that is where they picked us up. They picked us up on this side and they took us to Escondido.

Ag. To Escondido?

Wit. Uh huh.

Ag. Uh . . . to a house in Escondido, sir?

Wit. Yes, to a house.

Ag. How long were you at the house in Escondido?

Wit. 5 or 6 days from Sunday til Saturday. Sunday at dawn til Saturday around 4 o'clock in the afternoon.

Ag. Who took you or who brought you to house in Escondido?

Wit. A "pollero"/illegal alien smuggler took me.

Ag. What's this "pollero's" name?

Wit. They call him "Menchu" (phonetic spelling).

Ag. "Mencho?"

Wit. Yes.

Ag. Uh . . . How much money was "Mencho" uh . . . charging you?

Wit. $200 dollars.

Ag. To bring you uh . . . for taking you.

Wit. To Los Angeles.

Ag. To Los Angeles?

Wit. Yes.

Ag. OK. How long did you stay at "Mencho's" house in Escondido?

Wit. 6 days.

Ag. 6 days. Did more people arrive at Mencho's house in Escondido during the six days?

Wit. 5 more persons arrived Friday night or Saturday at dawn. I don't know.

Ag. Oh! Friday?

Wit. I was asleep.

Ag. Friday . . .

Wit. Yes.

Ag. Last Friday uh . . . When did you (plural) leave the house in Escondido?

Wit. We left yesterday—Saturday around . . .

Ag. Yesterday?

Wit. Uh huh.

Ag. Saturday the 29th of March?

Wit. Yes, sir.

Ag. 29th of March.

Wit. Around 4 in the afternoon or something like that.

Ag. Okay. Did you (plural) leave with uh . . . with more people or other persons?

Wit. Yes, the 5 that arrived including myself.

Ag. Uh . . . What happened after your arrival at the checkpoint on the freeway near Temecula.

Wit. After my arrival?

Ag. Yes.

Wit. Well, uh . . . Well, after having arrived there—we tried to run.

Ag. Uh . . . Did you stop at the checkpoint to talk to the officer?

Wit Yes, I stopped.

Ag. Were you aware that the officers wanted to talk to you concerning your citizenship?

Wit. Yes, sir.

Ag. Then why didn't you stop?

Wit. Well, I did stop but since I was bringing the people I already knew that I had had it/too late/ it was done.

Ag. And when you . . . when you left the checkpoint uh . . . How fast and how many miles?

Wit. Well, I'd say about 60 miles.

Ag. And how far from the checkpoint uh . . .

Wit. Did I stop? About a mile away.

Ag. A mile? And uh . . . did you stop?

Wit. Yes, sir.

Ag. A mile away from the checkpoint?

Wit. A mile beyond/past the checkpoint.

Ag. And what happened then?

Wit. Well, we got out running.

Ag. All of you?

Wit. From the car.

Ag. You and the 5 men . . .

Wit. I think so.

Ag. Travelling . . .

Wit. Myself and at least one other but I'm not sure if all 5 got out running.

Ag. Okay. How far did you run?

Wit. I ran for about 200 meters . . . something like that.

Ag. Were you followed by . . .

Wit. Yes, sir an off—

Ag. An officer or . . .

Wit. By an officer and also by a civilian who assisted.

Ag. Why did you run?

Wit. Well, I ran because I was afraid. I was afraid that they would catch me.

Ag. Uh . . . Why did you drive away from the checkpoint without talking to the officers, sir?

Wit. What do you mean?

Ag. Why didn't you stop at the checkpoint?

Wit. Well, I stopped . . . I did stop but I had been told by one of those (people) that was bringing us, that they weren't checking. I took over the car just before arriving at the checkpoint. That's why I took it over and by the same token I was told that they weren't checking. I thought to myself, "That's great I'm not going to be charged and get across the checkpoint." Once there I saw them signal for me to stop. What else could I do." But run because I was scared. (Inaudible) I acknowledge the charges of driving. But what was I gaining? I was only gaining what I was going to pay. That's all I can agree to and from there on. . . .

Ag. How fast uh . . .?

Wit. Was I going after (passing) the checkpoint?

Ag. Uh huh.

Wit. They are claiming 80 miles but that's not so. I'd say that I was barely going 60 miles per hour for the span of a mile.

Ag. Is there anything else you want to tell us concerning your case?

Wit. No. Well, the only thing . . . This is the first time I have landed (in jail) and . . . I have come on other occasions. I came here to this country last year. I didn't have any problems crossing or anything like that. They got me across all right. This time I failed and well, I wouldn't want to be accused of too many charges. Because this is the first time that I have ended up here in all this.

Ag. Thank you, sir. (English) This ends the taped statement taken from Ricardo Valenzuela Bernal. The time is 1:28 and the date is the 30th of March, 1980.

Translated by B.L.

The translation of this recorded interview is based upon sound using a transcriber provided by the United States Attorney's Office and upon the context of the questions and the answers in the interview as understood by the translator.

[3] SAN DIEGO, CALIFORNIA,

MONDAY, JUNE 2, 1980, 1:30 P.M.

(Other matters.)

THE CLERK: Number 23 on calendar, United States of America vs. Ricardo Valenzuela-Bernal, case No. 80-0237, for hearing motions to dismiss the indictment.

MR. WEINERMAN: Craig Weinerman, Federal Defenders, appearing for Ricardo Valenzuela-Bernal who is present in custody.

MR. DOYLE: David Doyle on behalf of the United States.

MS. CHLAD: Michele Chlad on behalf of the material witness who is present on bond.

MR. WEINERMAN: Your Honor, perhaps we can save some time here. I think we have basically agreed that there is something we can agree on without the need for testimony.

THE COURT: Go ahead.

MR. WEINERMAN: First of all, attached to my motion were Exhibit A through, I believe, F, and these are just merely letters that were sent out to various individuals, and Mr. Doyle has stipulated that these were sent out.

To show we have made an effort to reach these people, I'd like to read into the record who they are.

THE COURT: Yes.

MR. WEINERMAN: Exhibit A is a letter in Spanish and attached to it is a parole letter authorizing the witness to come into the United States on the 27th of May, which was the [4] original date the motions were to be held, and also the 3rd of June and also a subpoena for those same two dates.

This was sent to one of the witnesses who was released named Miguel Magana-Gayardo.

THE COURT: Yes.

MR. WEINERMAN: Exhibit B is the exact same packet sent to Alfredo Oliveras-Ochoa, a letter in Spanish asking him to come into the United States to testify in this case. A parole letter and subpoena are also attached to it.

Copies of all of these were attached to the motion, which Mr. Doyle has a copy of.

Exhibit C is an English translation of the letter sent to these two people.

I included one that was an English translation to Mr. Oliveras, and it is the exact letter which was sent to the other witness.

THE COURT: All right.

MR. WEINERMAN: Exhibit D is a letter in Spanish to the Chief of Police of a municipality in Jalisco, Mexico, which was the address given to me by Mr. Doyle as the last known address for Alfredo Oliveras-Ochoa.

It is a letter in Spanish, and this letter was sent for both Mr. Oliveras-Ochoa and Mr. Magana-Gayardo.

Exhibit E is the exact same letter to the Chief of Police of Mr. Magana's hometown in Michoacan, Mexico. [5] And Exhibit F is a Spanish translation—or an English translation of that letter sent in Spanish to the two Chiefs of Police.

THE COURT: Right.

MR. WEINERMAN: In addition, I have two other items which I would hope to make exhibits in this case.

Exhibit G is a letter we received from Maria Jose-Oliveras who apparently is the wife of one of the released witnesses. Mrs. Oliveras indicates—although I am not sure—attached to the letter which is written in Span-

ish and its English translation is basically we don't know the whereabouts of this person.

I'd ask that that also be marked as Exhibit G.

THE COURT: All right.

(Defense Exhibit G marked for identification.)

MR. WEINERMAN: Exhibit H would be an original copy of the letter sent to the Chief of Police in Tecuman, Michoacan regarding Miguel Magana-Gayardo.

It is basically just the original letter returned to me, and the envelope in which it was returned indicates that the letter was received in the village in Michoacan and it was just sent back to me and on the envelope it is written in English "Not Here."

That is from the Chief of Police or somebody received it on his behalf apparently.

[6] I'd ask that be admitted into evidence.

THE COURT: The way it is written, who is not here? You mean the Chief is not here, gone fishing, or what?

MR. WEINERMAN: It just says "Not Here" and an arrow was drawn pointing back to our office. If it means that the office of Federal Defenders is not here, that would be a accurate statement. Despite what people think, we are definitely not in Michoacan, Mexico.

THE COURT: I see.

MR. WEINERMAN: Mr. Doyle, your Honor, has no objection to any of the Exhibits.

THE COURT: Very well. They may all be admitted.

(Defense Exhibits A through H admitted into evidence.)

MR. WEINERMAN: The particular agreement we have reached to save time is I think Mr. Doyle agrees that these witnesses were released to Mexico on the date of Mr. Valenzuela's arrest, meaning they were brought

back physically into Mexico and left in Mexico, and apparently they were removed the same day as the arrest.

MR. DOYLE: That is correct, there was a voluntary return through the port of entry either the day of the arrest or the day after but before Mr. Weinerman could have any opportunity to interview them.

The other agreement that we reached, your Honor, [7] deals with the confession of the Defendant, and for this I must apologize to the Court. I had planned on having the case agent here today to testify to the contents of the confession.

He came in this morning and told me for the first time he had a tape of the confession, which I immediately had him take to the interpreter to start them working on it.

He had told me earlier there had been a problem with the tape, that the tape machine was malfunctioning that day. However, it turns out while it was malfunctioning during the statement of the one material witness who is still around, it was functioning when the Defendant's statement was taken.

So, there is a tape of a sworn confession from the Defendant, and it is about three quarters of the way interpreted right now, and as soon as it is complete we have an agreement that it may be entered into evidence for the purpose of this motion without any further foundation.

MR. WEINERMAN: That is right, your Honor, but I would like to refer to it as a statement as opposed to a confession. At this point it is a statement.

THE COURT: Well, are you talking about it not being voluntary?

MR. WEINERMAN: I am indicating it is just a statement as opposed to Mr. Doyle's referring to it as a confession. In my mind a confession is a complete admission of the offense.

[8] THE COURT: Do we know what it says?

MR. WEINERMAN: Well, the problem is I didn't—the tape thing came up today, and Mr. Doyle keeps

referring to this statement of my client as a confession by my client. Until the tape is completely interpreted I think we should reserve judgment on that and refer to it as a statement and not a confession because I believe that is going to have some bearing on what the Court's ruling is going to be.

MR. DOYLE: Yes, your Honor, it is not complete yet, but I am told there is a section though that is.

But, as to my referring to it as a confession, I think it will end up being properly characterized as a confession, but that will be for the Court to determine.

THE COURT: Yes. I'd like to see it.

MR. DOYLE: There is no problem in providing the Court now with the three quarters that is completed at this point.

THE COURT: Well, I don't want to see three quarters of it. I want to see all of it.

MR. DOYLE: Yes, your Honor, I think that to make a ruling the Court has to see that entire statement.

THE COURT: I agree. I agree. I am ready to make a ruling as soon as I see the statement if you are not contesting it was made voluntarily.

MR. WEINERMAN: No, your Honor. For the purpose of this proceeding, we will agree that statement was made voluntarily.

[9] THE COURT: Well, then we agree for the purpose of this proceeding it is a confession because then I can rule. If it turns out it is not, I will set aside the ruling.

MR. WEINERMAN: Your Honor, I would like you to have the whole statement—

THE COURT: Okay.

MR. WEINERMAN: —before you do.

THE COURT: When is this matter scheduled to go to trial?

THE CLERK: Tomorrow, your Honor.

MR. WEINERMAN: But, I would ask the Court to trail the matter a day or perhaps postpone it for a week so that we may litigate these motions.

THE COURT: Well, that is going to play havoc with our trial schedule. We have a big, big problem in that we have a civil case that is scheduled to go to trial tomorrow, which the Complaint was filed in 1975, and I'd really like to get that case to trial.

And this man is in continuous custody.

The maximum trial date is what, Mr. Clerk?

MR. DOYLE: June 18th, your Honor.

THE CLERK: June 18th, your Honor.

THE COURT: We will have plenty of time to try it if we must, and it is your intention irrespective of this you are going to trial, or do you know?

MR. WEINERMAN: I really don't know at this point.

[10] It depends on, of course, what the Court rules, and from one of the cases that originally was cited it indicates if he would go stipulated facts trial on this type of issue it would somehow be construed as waiving our right to cross examine some of these witnesses, and I want to look at it—

THE COURT: Don't do that.

MR. WEINERMAN: I would like to look at it a little bit closer before I do anything like that.

THE COURT: Yes.

MR. DOYLE: Your Honor, it would be less than a one-day trial. If we went to trial, I would call I think four witnesses in my case in chief, the three agents and then the agent who took the confession.

MR. WEINERMAN: It's a jury trial, but it could be done in a day.

THE COURT: We will set it over until I decide on the statement. That is okay.

Do you have anything else that you want to argue?

MR. WEINERMAN: Well, your Honor, I think that perhaps the statement or the testimony of the one retained material witness may enlighten the Court as to what these other witnesses might have said, and for the purpose of this hearing I'd ask that I be allowed to have

that witness just briefly state what his testimony would be at trial, what the facts and [11] circumstances were surrounding the apprehension of my client because I think that goes to—it is relevant as to the statement my client gave and also whether I could obtain no conceivable benefit from the testimony of the other witnesses.

He is available, he is present.

THE COURT: Call him. If he is in the courtroom, you are entitled to call him.

MR. WEINERMAN: Yes, your Honor.

His name is Enrique Romero-Morales.

THE COURT: Step forward, please, sir, to be sworn and take the witness stand.

ENRIQUE ROMERO-MORALES,

called as witness herein, in behalf of the defense, having been first duly sworn, was examined and testified through the interpreter as follows:

THE CLERK: Please take the witness stand, state your name, and spell your last name for the record.

THE COURT: Miss Interpreter, will you speak up enough so the Defendant can hear what you have to say?

THE INTERPRETER: Yes, I will, your Honor.

THE COURT: All right.

THE WITNESS: (Through the interpreter) Enrique Romero-Morales.

[12] DIRECT EXAMINATION

BY MR. WEINERMAN:

Q How old are you?
A. Twenty.
Q Where do you live?
A In Chihuahua.
Q Mexico?
A Yes.
Q You are from the Republic of Mexico?
A Yes.

Q Okay. Approximately two months ago, did you come into the United States illegally?

A Yes.

Q And who did you come in with?

By that I mean did you come into the United States illegally with some other persons?

A Yes.

Q How many other persons?

A Three.

Q Was this individual at counsel table in the blue jumpsuit, was he one of the persons who came into the United States with you illegally?

A No.

Q Now, were you arrested the same day you came into the United States illegally or the day after you came into the [13] United States illegally?

A The day after.

Q Where were you from the time you came into the United States until the time you were arrested?

A At a house.

Q Do you have any idea where that house is?

A No.

Q How long did it take you to get to that house?

A Half hour.

Q Now, referring to the next day, the day you were arrested, what time did you leave this house? Was it morning, afternoon, evening?

A In the afternoon.

Q And is it true that you left this house in a vehicle?

A Yes.

Q Besides yourself how many other people were in the vehicle?

A Five.

Q Now, was one of those persons in the vehicle the man seated at counsel table wearing the blue jumpsuit?

A Yes.

Q Was he the driver of the car?

A Yes.

Q Did you have any conversations with him at the house [14] that you stayed at?

A No.

Q Did you have any conversation with him during the ride from the house to the point where you were arrested?

A No.

THE COURT: Just a moment.

Mr. Valenzuela, can you hear what the interpreter is saying?

THE DEFENDANT: (Through the interpreter) I can hear, but it is very soft.

THE INTERPRETER: I will speak louder.

THE COURT: Why don't we put him up here in the jury box.

Come right over here next to the witness so you can hear. That's better.

Okay. Go ahead.

BY MR. MEINERMAN:

Q You said you never talked to Mr. Valenzuela?

A Yes.

Q You never told him you entered the United States illegally the day before, did you?

A No.

MR. DOYLE: I object to the leading nature of the question, your Honor. It is direct examination.

THE COURT: Yes.

MR. DOYLE: May the answer be stricken?

[15] THE COURT: It will be stricken.

MR. WEINERMAN: I have no further questions.

MR. DOYLE: Just a couple of questions, your Honor.

CROSS EXAMINATION

BY MR. DOYLE:

Q When you left the house in the vehicle, where were you sitting?

A In the back.

Q In the back seat?
A Yes.
Q Okay. Were any persons in the trunk of the car?
A No.
Q All the persons were inside?
A Yes.
Q When you started out, was everyone sitting up?
A Yes.
Q Did there come a point where everybody laid down?
A Yes.
Q Where was that?
A Before we got to the—well, when we saw there.
Q Okay. What did you see there?
A Well, just, well, the immigration officer.
Q What did the Defendant say—that is, the driver—when you saw the immigration officer?
A Just that they are checking.
[16] Q And after you got up to where the immigration officers were, did the driver stop?
A A little.
Q Okay. Then, what happened?
A He went ahead.
Q Okay. How did he drive the car, slowly or fast?
A Fast.
Q Okay. And how far did you go before you stopped?
A About a mile.
Q Okay. And when you stopped, what did the driver do?
A He ran.
MR. DOYLE: Nothing further, your Honor.
MR. WEINERMAN: Just a few questions.

REDIRECT EXAMINATION

BY MR WEINERMAN:

Q Approximately how was fast the car being driven?
MR. DOYLE: I think we need when.
THE COURT: Excuse me. I didn't hear.

MR. WEINERMAN: Let me strike the question. I will try to rephrase it.

Q After the driver passed the immigration point and started speeding up, how fast was the car going?

A Around 70 I think.

Q Now, when the car stopped, you said that the driver [17] ran.

A Yes.

Q Did you run also?

A Yes.

Q Did all the other persons in the car run?

A Yes.

MR. WEINERMAN: No further questions.

THE COURT: Okay. Do you have anything further?

MR. DOYLE: No, but as a matter of fact I'd like to state the Government is willing to stipulate that none of the persons released ever told the Defendant they were illegally present in the United States by saying to the Defendant those words or words to that effect, that they were illegal.

THE COURT: I want to ask him a few questions.

When you got into this car this gentleman here was driving, did the other people that you came into the United States with also get into the car?

THE WITNESS: No.

THE COURT: Just you?

THE WITNESS: Myself and another.

THE COURT: You and one other person got into this car?

THE WITNESS: Yes.

THE COURT: And what happened to the others that came in illegally with you?

THE WITNESS: They left. One went with me.

[18] THE COURT: Okay. But after you crossed into the United States illegally. All right. Let's take it from there. Okay.

You cross in illegally and you go to a house?

THE WITNESS: Yes.

THE COURT: And how many go to the house with you?

THE WITNESS: Four.

THE COURT: Okay. So, there is a total of five with you, you and four others?

THE WITNESS: Four with me.

THE COURT: You and three others?

THE WITNESS: Yes.

THE COURT: Okay. All four of you go to the house?

THE WITNESS: Yes.

THE COURT: Now, what happens is two of you, you and some other fellow, go with this gentleman here?

THE WITNESS: Correct, and two stayed there.

THE COURT: Two stayed in the house?

THE WITNESS: Yes.

THE COURT: And two went with this gentleman here, you and another person?

THE WITNESS: Yes.

THE COURT: Now, why didn't the other two go with this gentleman here?

THE WITNESS: I don't know.

THE COURT: Okay. Why did you go with him?

[19] THE WITNESS: Well, we were told there to get in.

THE COURT: Who told you to get in?

THE WITNESS: One of them.

THE COURT: One of whom?

THE WITNESS: Of the ones that were coming along with me.

THE COURT: Okay. He told you to get into his car?

THE WITNESS: Yes.

THE COURT: Now, how many people were in the car when you got in?

THE WITNESS: Five.

THE COURT: Were already in the car?

THE WITNESS: No, I was the first.

THE COURT: Okay. And then how many more got in after you got in besides the driver?

THE WITNESS: Four.

THE COURT: So, there were altogether six of you in the car, correct?

THE WITNESS: Yes.

THE COURT: How many in the front seat?

THE WITNESS: Three.

THE COURT: How many in the back seat?

THE WITNESS: Three.

THE COURT: Okay. And for how long did you drive?

THE WITNESS: About a half hour more or less.

[20] THE COURT: About a half hour?

THE WITNESS: Yes.

THE COURT: Okay. Now, when this man said something about immigration—

He did say something about immigration, didn't he?

THE WITNESS: Yes.

THE COURT: When he said something about immigration, what did you do?

THE WITNESS: I laid down on the seat.

THE COURT: Did everybody else lay down but him?

THE WITNESS: Yes.

THE COURT: Okay. Now, just before you laid down on the seat, did you see any flashing lights over the highway?

THE WITNESS: No.

THE COURT: Nothing?

THE WITNESS: I didn't.

THE COURT: Okay. That is all I am asking. Did you see any immigration officers?

THE WITNESS: Yes.

THE COURT: When did you see the immigration officers?

THE WITNESS: When we about to arrive.

THE COURT: And what happened when you saw the immigration officers?

THE WITNESS: Well, I crouched down.

THE COURT: Okay. What were the immigration officers [21] doing when you saw them?

THE WITNESS: Well, they were there checking inspection.

THE COURT: Okay. Now, when you laid down, you couldn't see them anymore, right?

THE WITNESS: No.

THE COURT: Is that correct, you couldn't see them?

THE WITNESS: Yes.

THE COURT: All right. And what happened to the car after you lay down on the seat?

THE WITNESS: Nothing.

THE COURT: Did he slow down or speed up or what happened?

THE WITNESS: It slowed down right before we got there, we arrived there.

THE COURT: Then what happened?

THE WITNESS: And then he drove off.

THE COURT: Okay. When did the car speed up to 70?

THE WITNESS: When he crossed there.

THE COURT: Okay. Now, did you see any immigration officials chasing you or following your car in the immigration car?

THE WITNESS: Yes.

THE COURT: How many?

THE WITNESS: One.

THE COURT: Did they have any red lights on?

[22] THE WITNESS: Yes.

THE COURT: Did they have their siren on?

THE WITNESS: Yes.

THE COURT: Okay. How long did they chase you? How long was it that they chased you to the best of your knowledge, the best of your recollection?

THE WITNESS: Two minutes maybe.

MR. DOYLE: Could I ask a couple of questions?

THE COURT: Go ahead.

RECROSS EXAMINATION

BY MR. DOYLE:

Q When you were at this house, was there somebody there who was in charge of the house?

A I don't know.

Q When you came into the United States, did you pay somebody to come into the United States?

A No.

Q Okay. Were you brought by another person?

A I don't understand.

Q Was there a smuggler?

A No, just the one that was coming with us.

Q Okay. And did you have a name for him?

A No.

Q Okay. This person that was coming with you, is he the one who took you to the house?

[23] A Yes.

Q Was he in the vehicle with you?

A Yes.

Q And was he the one who was giving directions?

A Yes.

Q Okay. Was he telling the driver where to go?

A He was the driver.

Q Did you hear anyone speak to the driver while you were in the car?

A No.

Q Okay. And did you see anyone speak to the driver at the house?

A No.

MR. DOYLE: Nothing further.

FURTHER REDIRECT EXAMINATION

BY MR. WEINERMAN:

Q The driver of the car didn't tell you to lie down when you got near the immigration check point, did he?

A No.

Q Now, what exactly did he say when you got near the immigration check point?

A Just that they were checking.

Q That is what he said?

A Yes.

MR. WEINERMAN: Thank you.

[24] THE COURT: You may step down.

All right, Mr. Weinerman. Do you have anything further?

MR: WEINERMAN: Your Honor, there is one other thing that just concerns me a little about the motion and the way it is coming to the Court other than the confession.

Mr. Doyle filed an affidavit in the case stating I think basically his thought process and explaining what he did and why he did it.

I am sure the Court is going to consider the affidavit, and I feel it might be proper to ask a few questions since he filed an affidavit.

I am not going to do this for any other reason; just to find out why it was done in this way. I think it is relevant since there are multiple ways the material witness problem, which seems to be the tenor of his response, can be handled other than just having a U.S. Attorney order or say to a criminal investigator, "You can let two out of the three people go."

There are other ways to handle it, and I think perhaps it is relevant to the Court's determination of what is a proper sanction, if any, as a result of what happened in this case.

MR. DOYLE: Your Honor, I can't testify without getting prior approval of the Attorney General. There is a procedure

[32] SAN DIEGO, CALIFORNIA

THURSDAY, JUNE 12, 1980, 9:00 a.m.

* * * *

(Prior related proceedings, not herein transcribed.)

THE COURT: Mr. Doyle, call your next witness.
MR. DOYLE: Call Border Patrol Agent Fernandez.

GEORGE FERNANDEZ,

called as a witness by the Government, having been first duly sworn, testified as follows:

THE CLERK: Please take the stand. State your name and spell your last name for the record.
THE WITNESS: George Fernandez, F-e-r-n-a-n-d-e-z.

DIRECT EXAMINATION

BY MR. DOYLE:

Q Mr. Fernandez, how are you employed?
A Border Patrol Agent.
Q Where are you stationed?
A Temecula.
Q How long have you been a Border Patrol agent?
A Approximately two and a half years.
Q How long have you been stationed at Temecula?
A A little over two years.
Q Were you on duty on March 29, 1980, in the late afternoon?
[33] A Yes, I was.
Q During the late afternoon were you assigned to work what's called "The Point" at the checkpoint?
A Yes. I was.
Q Could you briefly describe for the record here what it means to work "The Point" on the checkpoint?
A What you do is you direct traffic, and anyone that you want other agents to check for documents or whatever, you pull over to Secondary where the other agents check their documents.
Q And I assume then on the afternoon of March 29, 1980, the checkpoint in Temecula was in operation?
A Yes, it was.
Q What highway is that on?
A I-15.

Q Interstate 15?

A Yes.

Q At approximately 5:00 p.m. on March 29, 1980, did a vehicle come through the checkpoint that did not stop?

A Yes, it did.

Q And what was the first view you had of this vehicle?

A First view of the vehicle as it was coming up towards the checkpoint, maybe about a tenth of a mile.

Q What did you see?

A I saw the vehicle coming up at a slow rate of speed, [34] and as it approached the checkpoint, I motioned the driver to stop.

Q You say it was coming at a slow rate of speed. Had this caused any congestion on the freeway?

A Yes.

MR. WILLIAMSON: I object to the leading nature, your Honor.

THE COURT: Sustained.

Q (By Mr. Doyle) Now, as the vehicle came up to the point, what took place there?

A I motioned the driver to stop, but he refused to yield.

Q How fast was the driver going?

A By the time he got to the checkpoint, he was going about five miles per hour.

Q Were there any other cars around?

A Yes, there were.

Q Where were they?

A There was several of them behind the driver, behind the vehicle.

Q How did you motion him to stop?

A I motioned him to stop with my hand.

Q Did he stop?

A No, he didn't.

Q What happened then?

[35] A As he passed by me about, like I said, about five miles an hour, I looked in the back seat and saw several people lying there, and also in the front seat.

Q The people were lying down?

A Yes.

THE COURT: Mr. Doyle, I want you to show me what you mean when you say motioned him to stop with your hand.

THE WITNESS: Like this (indicating). Stuck out my arm, opening my hand.

THE COURT: How would you normally—what would you—are you working two lanes, one each side of you?

THE WITNESS: Yes.

THE COURT: Show me your normal function when you agree that the car need not be stopped and may proceed.

THE WITNESS: I motion like this (indicating).

THE COURT: With both hands?

THE WITNESS: With one hand, because if I go like that (indicating), the vehicles on both lanes would go. If two vehicles come to the checkpoint at the same time and I want one to stop, I will stick out my hand like this (indicating), and wave the other vehicle like this (indicating).

THE COURT: Okay.

MR. DOYLE: Your Honor, I'd like to describe the gesture for the record.

THE COURT: Go ahead.

[36] BY MR. DOYLE:

Q When you motion someone to go ahead, you take one of your hands out and move it toward your face?

A Yes, sir.

Q When you tell a vehicle to stop, you stick out your hand in what is characterized as a low salute?

A Yes.

Q Now, could you describe how these people were lying down in the vehicle?

THE COURT: Wait a minute. It's more than a low salute. He's got his hand up, palm out, facing the car.

Q (By Mr. Doyle) With the arm completely extended; is that right?

A Yes. I would say even with my head.

Q How were these people laying down in the vehicle?

A There was one in the front floorboard and another lying on the front seat. The rest were lying on the back seat and the back floorboard.

Q They were in such a posture that unless you looked inside you couldn't see them?

A Yes.

Q Now, did you take any other actions to attempt to stop the vehicle?

A Yes, I did.

Q What did you do?

[37] A I then ran to the car while it was still moving and tried to open the door on the driver's side, but it was locked. I then shouted at the driver repeatedly to stop. When I began to lose my balance, I released the car, and at the time the driver rode—

Q That was on the driver's side?

A Yes.

Q You were able to see the driver?

A Yes.

Q Do you see the driver in the courtroom today?

A Yes.

Q Describe what he is wearing.

A Wearing blue.

Q What type of outfit is it, a suit or something else?

A Blue shirt, blue pants, blue socks, black shoes.

MR. WILLIAMSON: Your Honor, stipulate he's identified the defendant.

THE COURT: All right.

BY MR. DOYLE:

Q So what happened after you had to let go of the door?

A The driver then accelerated. By that time Agent Boris went in pursuit of the vehicle, and I remained at the checkpoint.

Q When you had to let go of the vehicle, had he [38] already begun to accelerate?

A Yes, slowly.

MR. DOYLE: Nothing further.

THE COURT: Mr. Williamson?

CROSS-EXAMINATION

BY MR. WILLIAMSON:

Q Agent Fernandez, how many people in addition to the driver were in the vehicle?

A I would say maybe five people.

Q And did you review any notes or look at any reports before testifying here today?

A Yes, I did.

Q Do you have those notes with you?

A I reviewed the I-213 only.

Q Do you have a copy of that with you now?

A No, I don't.

Q I have a copy.

It's your procedure, is it not, to provide information to whomever prepares the I-213 so that all the important facts about an arrest or a case are contained in that report; isn't that correct?

A Yes, it is.

Q In fact, you are trained to do that at the Border Patrol Academy, aren't you?

[39] A No, not really.

Q But that's your own procedure that you follow?

A Yes, that we learn.

MR. WILLIAMSON: May I approach the witness?

THE COURT: Yes.

MR. DOYLE: Your Honor, if he's going to show him the document, I'd ask it be marked.

MR. WILLIAMSON: May it be marked Defendant's A for identification only? I do not intend to introduce it into evidence.

THE CLERK: Let's make it Defendant's I.

MR. WILLIAMSON: I'll accept that initial.

(Form I-213 is received and marked Defendant's Exhibit I for identification.)

BY MR. WILLIAMSON:

Q Agent Fernandez, I show you what's been marked Defendant's Exhibit I for identification and ask you if you recognize what that is.

A Yes, this is the I-213 of Mr. Valenzuela.

Q The I-213 about which you just referred?

A Yes.

Q And would you please show Judge Thompson where it talks about you running up and grabbing onto the door and telling the driver to stop?

A It doesn't mention that here in the I-213.

[40] MR. WILLIAMSON: No further questions.

MR. DOYLE: Just one or two, your Honor.

REDIRECT EXAMINATION

BY MR. DOYLE:

Q Sir, did you prepare this I-213?

A No. I didn't.

Q Who was it prepared by?

A Agent Gonzales.

Q Was he one of the officers involved in the pursuit of the defendant?

A Yes, he was.

MR. DOYLE: Nothing further.

THE COURT: You may step down.

Call your next witness.

MR. DOYLE: Border Patrol Agent Boris.

JOHN ANDREW BORIS,

called as a witness by the Government, having been first duly sworn, testified as follows:

THE CLERK: Please take the stand. State your name and spell your last name for the record.

THE WITNESS: John Andrew Boris, B-o-r-i-s.

[41] DIRECT EXAMINATION

BY MR. DOYLE:

Q Sir, how are you employed?

A Border Patrol Agent.

Q Where are you stationed?

A In Temecula.

Q How long have you been a Border Patrol agent?

A Approximately two and a half years.

Q Is that how long you've been a Border Patrol agent altogether?

A Over two and a half years.

Q Spent all that time in Temecula then?

A Except for the Academy.

Q Were you on duty March 29, 1980?

A Yes.

Q On the afternoon of that day did you have occasion to pursue a vehicle that did not stop at the checkpoint?

A Yes, I did.

Q Was there a vehicle that failed to stop at the checkpoint when Agent Fernandez was on duty there?

A Yes.

Q Do you see the driver of that vehicle in the courtroom today?

A Yes, I do.

Q Would you describe what he's wearing?

[42] A Wearing a blue jumpsuit, blue socks.

THE COURT: The Record may reflect he's identified the defendant.

MR. WILLIAMSON: No objection.

BY MR. DOYLE:

Q How was it that you came to be involved in this?

A I was sitting at the—by the radio, and I observed Agent Fernandez trying to stop a vehicle, and after I saw it accelerate, I heard Agent Fernandez yell that there was aliens in the car. So I got in the car and pursued the vehicle.

Q Was there anyone with you?

A Agent Gonzales.

Q The vehicle was fleeing north?

A Fleeing north on Interstate 15.

Q And how far were you behind the defendant when you got into the pursuit?

A I'd say approximately about a hundred yards.

Q And how fast were you going?

A We were going 80 at least.

Q How much?

A At least 80 miles per hour.

Q And were you able to estimate the speed of the defendant's vehicle?

A It had to be over 80 miles per hour. He was [43] gaining on us—sorry, he was losing us.

Q So he was pulling away from you?

A Yes, he was.

Q You were going over 80?

A Yes.

Q What is the terrain there like on the highway after the checkpoint?

A As soon as you come past the checkpoint there's a hill and—

Q Is that a steep hill?

A Yes.

Q And when you were in pursuit, did you have any of your emergency indicators on, your red lights?

A Yes, I had the red lights activated at that time.

Q Anything else?

A The siren.

Q How did this pursuit come to an end?

A The vehicle we were in pursuit of pulled off the I-15 ramp toward Temecula and came to an abrupt stop there.

Q What happened when the vehicle stopped?

A The right front seat passenger and the driver exited the vehicle and crossed the Interstate west.

Q Ran across the Interstate?

A Ran across the Interstate.

Q Was there other traffic on the road at this time?

[44] A Yes, there was. As the car was pulling off, coming to a stop, it veered, swerved, and I believe it was a little Chevy Chevette that was run off the road, and after I observed them exiting the vehicle, I observed three others in the back seat get out and go east, run east.

Q So the defendant and one other front passenger went west?

A Yes.

Q Three in the back seat went east?

A Right.

Q What did you do?

A I went in pursuit of the driver and the right front seat passenger.

Q You also had to run across the Interstate?

A Yes.

Q Was that dangerous?

A Yes, it is.

Q What happened next?

A I chased the driver and the right front seat passenger into a small field and they separated, and I went after the right front seat passenger, and I subdued him, and as I was walking back, I observed a passerby in pursuit of the driver, and he brought him back.

Q So this is someone—a citizen?

A Yes.

[45] Q And after you had the two of them, what did you do?

A I frisked them, patted them down. I had the right front seat passenger already handcuffed, and I patted

Mr. Ricardo down and grabbed them by the back of their belts and walked them back to the Border Patrol sedan.

MR. DOYLE: Nothing further.

THE COURT: Mr. Williamson, do you have any cross-examination of this witness?

CROSS-EXAMINATION

BY MR. WILLIAMSON:

Q The Interstate we're talking about the checkpoint is on is I-15?

A Yes.

Q It's a four-lane freeway, or bigger than that. I'm not sure how many lanes.

A At least four lanes and maybe six, yes.

Q Right over when it gets on top of the hill going north, it drops down to Temecula?

A Yes.

Q It's the first exit for I-79 you can take towards Hemet the back way, or Temecula on the left, to try to turn off on?

A That's right.

Q And it was right on that off ramp they stopped [46] their vehicle and—

A Yes.

Q So they actually were off the freeway?

A Yes, they were on the off ramp.

Q And then the driver and the passenger ran back onto I-15 itself or I-79?

A No, it was I-15.

Q And the other three individuals went—

A There was a condominium complex they ran towards.

Q The Rancho California complex?

A Yes.

Q By the golf course?

A Yes.

Q They ran that way?
A Yes.
Q Were they ultimately apprehended?
A Yes, all but one.
Q So a total of how many—
A I believe a total of five were apprehended.
Q And what do you do with people when you arrest them there at Temecula? Do you take them to a holding facility initially?
A We took them right back to the checkpoint and held them there.
Q Room for all five there?
[47] A Yes, we have.
MR. WILLIAMSON: No further questions.
MR. DOYLE: Nothing further, your Honor.
THE COURT: You may step down.
Anything further?
MR. DOYLE: No, your Honor, the United States rests.

(Further related proceedings, not herein transcribed.)

* * * *

CERTIFICATE

* * * *

I, Barbara Lynch, certify that I am a duly appointed, qualified, acting Official Court Reporter for the United States District Court, Southern District of California.

I further certify that the foregoing partial transcript is a true and accurate transcription of the proceedings taken by me stenographically in the foregoing matter on June 12, 1980.

Dated at San Diego, California, this 25th day of June, 1980.

/s/ Barbara Lynch
BARBABA LYNCH, C.S.R.
Official Court Reporter

[63] SAN DIEGO, CALIFORNIA

TUESDAY, AUGUST 12, 1980, 9:00 A.M.

* * * *

THE CLERK: November 3 on Calendar, Case No. 80—237, United States of America versus Ricardo Valenzuela-Bernal, hearing report of Probation Officer and sentence, finding of guilty.

MR. WEINERMAN: Good morning, your Honor, Craig Weinerman, Federal Defenders, for Ricardo Valenzuela-Bernal, present in custody.

THE COURT: I've read and considered the Probation Officer's report. Do you have any thing to say on behalf of your client before I pronounce sentence

MR. WEINERMAN: Yes, your Honor.

Before the Court is Mr. Valenzuela, who is 21 years old, who has no prior entries into the United States illegally, no prior apprehensions, or no prior convictions. I would say to the Court that he's probably as much exploited in this case as the people he drove. By that I mean he came into the United States illegally, smuggled in himself. He was almost kept hostage in a drop house up in Escondido, waiting until the people who smuggled him in allowed him to leave and drive a load to Los Angeles so he could get to his ultimate destination.

This is, your Honor, more serious an alien smuggling case because Mr. Valenzuela drove recklessly before he was [64] apprehended. But I would ask the Court to avoid, if possible, categorizing this case and not giving Mr. Valenzuela the opportunity to gain some of the benefits as other defendants do who come before this Court.

By that I ask the Court to tailor the sentence to the individual. There are many cases that come before this Court, and I recognize this Court does not, for example, give probation in a bank robbery case, a very serious offense, but I think more than just the seriousness of the offense has to go into the sentence to deter-

mine the individual—the individual, and what he is about, and his attitude is important.

Can the Court look at Mr. Valenzuela as an individual, rather than just at what he did, that he drove recklessly in this case? And I've asked the Court to recognize that here is a man, I think, who's rehabilitated.

I'd point to a couple of instances that happened in this case. I hope the Court remembers. We had a motion hearing in this case. This was a case where Mr. Doyle released the witnesses before the case even came to trial. And we had two days of motion hearings, and I believe after the first day in front of the Court, during one of the breaks, Mr. Valenzuela admonished me, saying, "I'm guilty. I want to get it over with. I want to plead guilty," basically saying, "I don't want to go through all the legal [65] maneuvers. I'll plead guilty, get it over with."

I tried to explain throughout he probably would be found guilty, but perhaps we had an issue that might one day help him out on appeal, and I think the Court might remember saying something to Mr. Valenzuela after one of the proceedings, telling him not to get upset with us, we were just trying to help him.

What I'm asking the Court to take out of this, I think this is a rehabilitated man who never had any doubt about what he did. He recognized he was guilty, he did something wrong, and wanted to plead guilty from the start, and he recognizes he did something wrong, and I think he would never do something like this again, just based on his attitude before the Court.

Look at his probation report and the interview at the probation office. It is complete, he was totally candid about what he did. He admitted he did something wrong. I didn't put this in his mind. He asked for it. "Let the Court give me as much time as the Court wants. Let time hang over my head so I won't come back." I think that's what he wants.

I'm hesitant—I know he can go back to Mexico, encounter the same conditions there and want to come into

the United States. He may be able to take a risk in the future—I hope he won't—but he's willing to take the [66] risk and spend the sentence, or most of it.

I would ask the Court to remember—and I was reading the transcript last night, the probation report, which I think—and the official version, looking at the Government report, indicated Mr. Valenzuela was driving a hundred miles an hour. I was looking at the transcript, and the transcript, the officer who testified at the hearing, was talking in terms of 80 miles an hour.

What I'm saying is I don't think we're dealing with an exact figure here. We're not dealing with a highway patrolman or a San Diego city police officer raid car to make an exact determination of how fast he was going. He was going too fast, no doubt about it that what he did was wrong, but I think if the Court is saying, "I can't give a break to somebody driving a hundred miles an hour," I don't know that that is necessarily what happened in this case. I think the truth possibly lies somewhere in between.

Finally, the things I would like the Court to consider as far as this man having experienced punishment already, he's spent 137 days in custody thus far. When he was apprehended, I think he was apprehended by some citizens in the Temecula area, and he was beaten up, and perhaps should be—you might say he deserved it, he drove recklessly, fast, and when he was apprehended prior to his apprehension he ran away, and when he was caught, he was [67] beat up, but that's punishment. Just from that alone, I would think someone like Mr. Valenzuela would say, "Hey, I don't want to do something like this again. I don't want to get beat up."

He has been in court on many occasions and doesn't like that. He's been in jail 137 days and is now before the Court for sentencing, and he's been waiting for this moment a long time with great apprehension.

What I'm saying to the Court is all this has had a very great impact on him, and I think if you look at all

the things he's gone through and his attitude, I don't think it would be unreasonable for the Court to follow the recommendation where he got a split sentence, like 179 days. Take six months out of his life, give him time beyond that, but suspend the execution, and I think in light of everything, Mr. Valenzuela has learned his lesson, and I don't think he will come back again, illegally or driving other people.

THE COURT: Mr. Valenzuela, do you have anything to say before the Court pronounces sentence?

THE DEFENDANT (Through Official Court Interpreter:)

No. Just that—that I am not planning on coming back.

THE COURT: Mr. Gorder?

MR. GORDER: Your Honor, the Government would recommend [68] some period of time in custody. Therefore, we have to disagree with the pre-sentence report here. This was a serious case, involved a high speed chase, which happens all too often in this district. This defendant endangered the lives of the aliens he was transporting, endangered the lives of patrol agents who had to chase him, and other people who were just driving down the highway, and we think, despite the fact he has no previous record with us, that a period of time in custody is in order, and would recommend at least a year.

THE COURT: Well, I think under the circumstances, given no prior record and his age, I think that, Mr. Valenzuela, you have to understand what occurred in this case. You endangered the lives of those people who you were driving, your own people, and had you not been able to control the car, you could have well killed those people with your driving. That's as to your own people.

Now, when you get in a high speed chase, whether 60 miles an hour or 80 miles an hour or 100 miles an hour, the fact of the matter is you endanger everyone on the highway sooner or later. Not only are your own people going to be injured, as they have been many times by

fellows doing exactly what you were doing, driving for free to go north, and severing arms and legs of your own people who are caught in accidents, killing them. And I just think it's a [69] question of time until one of you—may not be you, but it will be one of you, sure as God made little green apples, is going to kill somebody on the highway—and some of our people by your desire to get here, and we can't tolerate that.

Your situation is such that you ought to have taken that into consideration. While you may only be 21 years of age, you have a wife and a child, and I'm sure that did, to a certain extent, motivate you to come into the United States. But I would suggest to you that the United States is no place to endanger the lives of your own citizens, and particularly our citizens. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Because had you injured one of our citizens in that high speed chase, you could have well been before the state court as well as this federal court, and the maximum sentence in this case is five years, which probably, but for your age and for your lack of a prior record, you would receive, at least from this Court.

So you think about that the next time, and let me say, as long as I sit here, if there is a next time in which you come—even come into this country—I'm going to treat you as a menace, which I think you are, to our people as well as to your own people, and I'm going to put you away for the full five years. Do you understand?

[70] THE DEFENDANT: Yes.

THE COURT: In this case it is adjudged the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years on the condition that the defendant be confined in a jail type or treatment type institution for a period of 179 days. The execution of the remainder of the sentence of imprisonment is sus-

pended. Defendant is placed on probation for a period of five years upon the following terms and conditions:

First, he obey all the laws of the federal government, the state government and the municipal government; second, that he comply with all lawful rules and regulations of the Probation Department, if he comes back into the United States legally. If he's deported, then supervision is waived. That is, as soon as he does come back into the United States, within 24 hours, if he does legitimately and legally, he is to report to the Probation Office immediately, that is within 24 hours of his re-entry into the United States, at which time he will begin being supervised. He is to report to the Probation Officer all vehicles he owns, operates or has any interest in after or if he comes back into the United States.

In this judgment you are a deportable illegal alien. The Court is going to recommend that you be deported, [71] not voluntarily returned, deported to the Republic of Mexico permanently. That's all.

THE CLERK: Advice to appeal?

THE COURT: You have a right to appeal your conviction. If you cannot afford to appeal your conviction, the Court will cause an attorney to be appointed to represent you on appeal and cause the record to be sent to the Circuit Court free of charge.

Just remember, if you ever come back before me again, five years.

THE DEFENDANT: Yes.

MR. WEINERMAN: Thank you.

(End proceedings.)

* * * *

[4] I think Mr. Weinerman was in command at the time we concluded, and he was going to call you as a witness.

MR. DOYLE: That's correct, your Honor, and I would like to ask the Court when that's finished or before, to reopen and call two witnesses, two other witnesses, two border patrol agents from the checkpoint involved in the defendant's apprehension at the checkpoint.

MR. WEINERMAN: Your Honor, I would call Mr. Doyle.

DAVID C. DOYLE,

called as a witness by the defense, having been first duly sworn, testified as follows:

THE CLERK: Take the stand. State your name.
THE WITNESS: David Clarence Doyle.

DIRECT EXAMINATION

BY MR. WEINERMAN:

Q Mr. Doyle, how are you employed?
A Assistant United States Atorney.
Q You are the Assistant United States Attorney assigned to this case, United States of America versus Ricardo Valenzuela-Bernal?
A Yes.
Q You've been employed with the U.S. Attorney's office approximately two years?
[4A] A Approximately two years.
Q During that period of time you have handled cases involving this type of offense, illegal transportation of aliens?
A Yes, I have.
Q During the period of time that you've been handling these types of cases, you've become very familiar with the principles of the case of *United States* versus *Mendez-Rodriguez*?
A Yes, I have.
Q I'll give you a chance to explain your position. Would it be accurate to say that recently, or within the past few months, you have been contemplating a challenge to *United States* versus *Mendez-Rodriguez*? Feel free to explain.
A Well, you could use the word "challenge," but I think that's too broad a phrase. What I've been contemplating is attempting to use the recent 9th Circuit cases,

which my reading of them indicates the 9th Circuit has significantly limited *Mendez-Rodriguez*. I've been contemplating using those 9th Circuit cases to effect a change in the way we handle material witnesses in this district.

Q That change would be releasing some of the material witnesses immediately after arrest, rather than holding them for interviews by defense counsel?

[5] A Yes. In particular situations which I believe, based on these recent 9th Circuit cases, that such release is proper.

Q And would it be fair to say this is one of the cases where that has happened?

A Yes, it is.

Q Now, in this case the arrest of Mr. Valenzuela, I believe, took place on March 29, 1980; is that your understanding?

A Yes.

Q And shortly after his arrest were you in contact with one of the arresting officers, or one of the investigating officers in this case?

A I was contacted by a criminal investigator in the Chula Vista Anti-Smuggling Unit.

Q Was that the same day as the arrest of Mr. Valenzuela?

A I believe so. I think so.

Q What was the name of the investigator?

A I'm not sure who it was. It was whoever got the initial paper work from Temecula. Could have been the next day. I'm not certain.

Q Your affidavit says, "Shortly after defendant Valenzuela-Bernal's arrest, March 29, 1980." Could it have been the same day or possibly the day after?

[6] A Right.

Q And you had a telephone conversation with the investigator?

A Yes.

Q How long was the telephone conversation?

A Probably ten to 15 minutes.

Q Now, was he calling you for the specific purpose of determining whether you could release these witnesses pursuant to a case policy that you wanted to proceed with, consistent with what you've just testified?

A Yes, he was.

Q Had you talked to him earlier, weeks before, months before, about possibly doing this following this type of procedure in a case?

A I had indicated to the head of the Anti-Smuggling Unit at Chula Vista there, Richard Smith, that my reading of these cases indicated to me that given the right set of facts, in which there could be no possibility of prejudice to the defendant, it would be appropriate to go ahead and release material witnesses, and therefore Mr. Smith was aware that I was looking for sets of facts which, obviously, involved no prejudice.

When this set of facts came to his attention, I think he had disseminated that among other criminal investigators, and when this case came in, they contacted me.

[7] Q And in your belief was this criminal investigator contacting you along those lines that it was, maybe, the kind of case you wanted to release the witnesses?

A Yes.

Q You don't remember the name of the investigator?

A No, I don't.

Q Could you tell us briefly what he told you about the case when he called you that day?

A He told me that there had been a complete confession by the defendant, that he had admitted both that he was the driver and that there were illegal aliens in the car, which he was aware. I believe I was also told it was a situation in which the driver claimed to be driving for a free ride, which is a common explanation given by aliens.

I was also told that the agent at that point had been able to see aliens lying down in the back of the vehicle as it went by the point, and I was told that there had been a serious high-speed chase after the defendant ran

the point, and that the defendant, after the high-speed chase had terminated, also fled on foot and had to be apprehended after fleeing on foot.

Q This wasn't Mr. Banks who called you?

A It could have been. But I don't think it was Mr. Banks. I think it was another agent down there, but I'm not absolutely certain.

[8] Q Herbert Banks, you now know, is the one that took the statements from Mr. Valenzuela?

A That is correct. And he's also the case agent.

Q But here today you don't believe that he was the one that called you and told you about the facts and circumstances?

A I really just don't know. But I'd say if I was going to give probability—one thing in mind makes me think it wasn't Mr. Banks, but there's probably a 40 percent chance it was Mr. Banks.

Q After he described the facts of the case, did you direct him that it would be proper to release some of the witnesses in the case?

A Yes, I directed him to release all but one witness, and I simply told him to go ahead and pick—I believe there were only maybe three witness' total that had been apprehended. Some had escaped, and I told him to go ahead and just select any of the three. I didn't care which one. Didn't matter what they said. The only reason we wanted to keep one is we wanted to have a non-hearsay basis for establishing that he was an illegal alien.

Q Did he provide any information to you about statements or conversations he had had with any of these three material witnesses?

A I asked him what they said, and he said they all [9] said that the defendant is the driver and that there was no difference between what any of the three said. They all did identify the defendant as the driver.

Q But he indicated he had talked to the witnesses?

A Yes.

Q Now, you indicated earlier on the record that shortly you were going to introduce the defendant's confession into evidence in this case; is that correct?

A Yes.

Q And this transcript of the statement he gave to Mr. Banks that was just recently transcribed; isn't that right?

A Yes. It was transcribed by the interpreters' office from in hand written form, and my secretary had it typed up.

Q That was approximately two weeks ago?

A I think that's correct. The handwritten version was completed about two weeks ago.

Q Would it be correct to say that this transcript was not available at the time the decision was made to release the witnesses?

A That's correct, the transcript was not available.

Q Now, you indicated earlier that you had experienced prosecuting cases involving this type of offense.

A Yes.

[10] Q I imagine you interviewed many material witnesses while you've been an Assistant United States Attorney?

A Yes, I have.

Q And I believe you tried a number of cases involving this type of offense?

A Yes, I have.

Q And some of those cases involved testimony from material witnesses?

A Yes, they have.

Q Would it be accurate to say that on some occasions, or perhaps many occasions, material witnesses tend to change their testimony compared to their statements, or they do give inconsistent accounts compared to the statements earlier given?

A My experience has been I've never had a material witness give a statement that was different in any significant aspect from the taped sworn statement they had

given shortly after their arrest. I have had them at trial, I have had them in the intervening time between giving the taped sworn statement and the trial, having given inconsistent statements during that period of time while being incarcerated at the Metropolitan Correctional Center.

But in all of those situations either the defendant pled guilty and they were not required to come and testify in court, or they came to court and testified consistently [11] with their original sworn statement given to the agents and repudiated the statements they had given in the intervening time.

Q Would it be fair to say whether a significant detail or insignificant detail, they do change their statements from time to time?

A I would just be—that's—yes, obviously. And incorporating my explanation I just gave as to how that happens.

Q For example, we are currently litigating another case named *United States* versus *David Vargas-Hernandez*; is that correct?

A That's correct.

Q In that case material witnesses gave a taped sworn statement as to the events?

A That's correct, they did.

Q And although that case has not come to trial yet and has not even had depositions, has it come to your knowledge that the witnesses are now giving different statements than they originally gave to the investigating officer?

A Well, that's only come to my attention because you've told me that, but I haven't heard it from the attorney for the material witnesses, nor have I heard it from the material witnesses themselves.

Q Getting back to your direction or authorization [12] to release the witnesses, was that based on your determination or conclusion that the witnesses would be of no help to Ricardo Valenzuela in this case?

A That's correct. And also my determination that given the strength of the evidence, based on all the other factors present in the case, that they were also of no need to the government either.

Q You did this in your role as an Assistant United States Attorney?

A That's correct.

Q And is it accurate to say since you've been an attorney you've been an Assistant United States Attorney?

A No. I was also a Federal District Court Law Clerk for two years.

Q You've never defended a defendant charged with illegal transportation of aliens?

A No, I haven't.

Q Now, before you directed the immigration officers to release the witnesses, did you consider the alternative of giving the witnesses parole letters and having them return to the United States at a later time?

A No, I did not.

Q Why didn't you consider that alternative?

A Because it has been my experience that the giving of such parole letters is—it's simply so unlikely that [13] they're actually going to return and comply with those letters and that request, that it's simply not worth the effort.

Q Now, in your opinion, if someone were given a parole letter and won't show up, do you think the government would be held responsible for their unavailability?

A I don't know.

Q You've never tried that method of dealing with material witnesses then, I take it?

A I have in a situation in which witnesses have been incarcerated for quite a length of time at the metropolitan correctional center, and it was in the context of an investigation in which we were concerned that there might be a possible problem. That was in the case of

Tsudagowa (phonetic), and therefore I issued parole letters at that time in that investigation.

Q Now, talk about the *Tsudagowa* case, you're familiar with the mention in *Tsudagowa* that perhaps alternatives to incarceration, like work farms, things like that, might be proper in dealing with material witnesses?

A There is a reference to that, I believe, in the opinion. I'd have to look at it to be absolutely certain. But the problem with work farms is that that was tried and was being used, I think, on an on, off and on basis back around the time the *Mendez-Rodriguez* decision was rendered, [14] and the experience was that the aliens simply would not stay at the work farm, that they found out when their day in court was, and they would work up until near the day of their appearance in court, realizing when they came to court they were then going to be sent back to Mexico, and shortly before their appearance in court they would then take off and complete their illegal entry with the extra money they had been able to earn.

Of course, I think—I guess they withheld half of it, but that was not enough of an anchor to keep them here because the reason they come in the first place is to get into the United States.

Q When was the last time the work farm concept was tried, to your knowledge?

A I don't know the exact date. My understanding from discussing the whole situation with other assistants in our office, it was in use on—it was attempted and in use around the time of the *Mendez-Rodriguez* decision.

Q Around 1971, approximately?

A I don't know anything other than that.

Q Hasn't been tried in quite a long time, though, has it?

A Not to my knowledge it hasn't.

Q Recently, since you've been in the office dealing with the material witness problem, are you aware of any [15] decisions between the assistant United States attor-

neys or the marshal to try to get the program reinstated or try as an alternative to release the witnesses?

A No.

Q Are you familiar with the case of—strike that. Now, you obviously are aware of the procedure of material—

A Yes, I am.

Q The question was: Are you aware of the procedure of material witness bail and cases where material witnesses are held in custody?

A Yes, I am.

Q And depending on when the defendant is arrested and when the case goes to the grand jury, usually the material witnesses are held in custody anywhere from five to ten days before the material witness' bail review hearing?

A That's right.

Q In this case did you consider allowing the material witnesses to be held in custody for that short period of time rather than releasing them?

A No, I didn't, because I don't consider any period of time in jail a short period of time.

Q That was not the considered alternative to releasing the witnesses?

A No.

[16] Q Now, you're familiar wtih the case of *United States versus Lujan-Castro*?

A The name—you'd have to refresh—

Q That's the case that authorized or accepted defendants charged with illegal transportation of aliens signing waivers of their rights to retain the material witnesses.

A Right. I remember that.

Q Does not the United States attorney in this district and the border patrol have such a form available for defendants to sign to release material witnesses on the same day as the arrest?

A Yes, they do.

Q Were those forms available at the time you directed the material witnesses to be released in this case?

A Yes, they were.

Q Why wasn't that procedure utilized instead of just releasing the witnesses?

A That procedure was not utilized for two reasons: One, because it depends upon cooperation and good faith, so to speak, of the defendant, and I did not feel that people who had been transported by this defendant should be dependent upon his cooperation and good faith in being returned to Mexico when they had no—there was no possibility that they could provide any information beneficial to him, and [17] it was the determination of the government they weren't necessary to further the government's case either. So I believed that it was simply unnecessary in a case such as this to use a waiver form.

Q In other words, the investigator did not attempt to have Mr. Valenzuela sign one of those release of material witnesses in this case?

A No, he did not.

Q Those forms were available at that time?

A Yes, they were.

Q And has not that procedure been employed in cases similar to Mr. Valenzuela's, where a determination could be made that the witnesses would not be of any benefit to the defendant?

A Yes, it has. It was my intention to establish another alternative procedure in appropriate cases handling material witnesses.

Q When you use the release of material witnesses, the witnesses would be released the same day?

A Hopefully. If not that day, they would certainly be released the next day.

Q They would not have to suffer much incarceration if that procedure was employed, would they?

A They would not. That's correct.

MR. WEINERMAN: I have no further questions, your Honor.

[18] THE COURT: All right. Mr. Nunez, do you have any questions?

CROSS-EXAMINATION

BY MR. NUNEZ:

Q Mr. Doyle, I think the facts of this case occurred on March 29, 1980. Are you aware of the fact that was a Saturday?

A I think it was a Saturday, yes.

Q And the phone call you got from the criminal investigator, was that a phone call you received at your home?

A Yes, it was.

Q Mr. Weinerman asked you about information you received from over the telephone from the agent.

A Yes.

Q And he asked if you were told what the alien material witnesses stated, what their statements were. Were you told that any of the material witnesses said anything exculpatory or anything favorable to the defendant on the issue of guilt or innocence?

A I asked that and I was told that they had not, that they corroborated his confession.

Q Now, Mr. Weinerman also asked you several questions about the alternatives, what he determined alternatives to [19] the release of aliens held as material witnesses. And starting with the last one, he discussed the waiver procedure. In our answer you said there were two reasons you didn't consider that in this case.

A Yes.

Q The first was that it depended upon the cooperation and good faith of the defendant.

A That's correct.

Q What's the second reason?

A Okay. The second reason was that I wanted to establish—I mentioned later an alternative procedure in cases such as this, where there was no possibility of prejudice, that would not rely on good faith cooperation of the defendant, so the two are related.

Q Now, he also asked if you are familiar with the procedure in this courthouse by which the magistrates and the court handles material witness' bail reviews.

A Yes, I am very familiar with that.

Q Would you describe, please, exactly what happens in the magistrate's court in a case where material witnesses have been held and are in custody during the time the complaint is filed.

A When the complaint is filed, all the people in the vehicle being used by the defendant are brought to court, and they are arraigned as material witnesses. They are at [20] that time assigned an attorney, and they are then taken, most of them are taken to the Metropolitan Correctional Center to be held.

Then the case is almost inevitably indicted, and that's the means by which, rather than holding them for a preliminary hearing, an indictment is returned some time within 10 days. Usually, very near the end of the ten days there is an arraignment on the indictment. Usually, at the same time of the arraignment on the indictment, there is held what's called a materiality hearing on the material witnesses. So on most material witnesses, they are held approximately ten days until such time as the materiality hearing is held.

At the materiality hearing, both sides, prosecution and defense, must then make a showing as to why they believe these witnesses are material to their case, and in the vast majority of cases, I would say somewhere around 90 percent, if not higher, the only showing made is by the government.

The government selects out, usually, two people from the vehicle which it retains to establish alienage, and

other inculpatory information, and the others are released after the ten days.

Q So that in a case that is going as a felony, which proceeds to indictment, there's generally—all material [21] witnesses are held for at least that ten-day period?

A That's correct.

Q Is it your experience that quite often the materiality hearing does not resolve the status of all of the material witnesses so there is an open-ended period of time that the aliens are held in custody?

A Absolutely. That's established in a very graphic fashion by the affidavit of Marshal Laffoon, which sets forth on a day-by-day basis the amount of time that material witnesses have spent in custody, and there are some horrendous examples there—I believe some upwards of 80, 90 days—and there is a very significant number that remain in custody between 20 and 50 days.

So it's not unusual at all that it's not resolved at that time, and what happens is the material witnesses become pawns in litigative tactics, being—

MR. WEINERMAN: Your Honor, I object as an improper foundation for this question. Also, its' nonresponsive, but I object as to lack of foundation as to "pawns."

THE COURT: Yes. Once you start in that area, that's a little beyond the scope of the question.

BY MR. NUNEZ:

Q Mr. Doyle, we've established that there are several alternatives. Mr. Weinerman mentioned one is a waiver procedure; one is, or was, a farming out procedure; [22] another was the bail review process.

Are you aware that stipulations for the testimony of the aliens and for their release is another alternative used quite often in this district?

A Yes, there is a procedure used quite often as well.

Q Another alternative is occasionally depositions are ordered of material witnesses?

A Yes, that's also another procedure.

Q With respect to stipulations for the release of the aliens, I assume that involves aliens who go past the materiality hearing stage, where someone on the other side made a showing of materiality, and we now have some material witnesses being held for testimony?

A That's correct.

Q How does the stipulation procedure work?

A The stipulation procedure proceeds, usually, by the magistrate suggesting that the parties attempt to stipulate to the testimony of the material witnesses, at which point the attorney for the material witnesses will usually draft a stipulation after consulting with both sides as to, you know, what will be acceptable and what will be unacceptable; and it's been my experience with the stipulation procedure that usually what ends up happening is that the government, to prevent people being held for inordinate lengths of time, stipulates to much less than the witness [23] would actually testify to as far as inculpatory information, and also, oftentimes, is forced into a position it actually has to stipulate to what it knows to be inaccurate information that the witnesses could not identify the driver, when in truth and in fact, the government knows, based on their prior statements, they could, but just to avoid the obvious cruelty of keeping someone in jail when it's unnecessary, sometimes you are forced into a position where you have to stipulate to inaccurate information.

Q Is that because the defense attorney handling the case and/or the defendant are unwilling to stipulate to the full scope of what the material witness would testify to?

A That's correct.

Q Is that what you were referring to when you used the word before that the material witnesses become pawns in the process?

A Yes, that's one of the many ways they become pawns.

Q Now, in your experience is it common for defense attorneys and/or defendants to require that material witnesses be held in custody pending a trial and then those material witnesses are not called as witnesses by the defense?

A Yes, that's happened to me a number of times, and it's happened to all of the other assistants in our office that I've spoken to. Happens quite frequently.

[24] Q So in those cases the material witnesses end up spending quite a bit of time, whatever time is necessary to prepare for trial, and then are never actually called as a witness?

A Those are the ones who end up staying somewhere a total of 60 to 90 days in custody.

Q To your knowledge, Mr. Doyle, is there any present arrangement or contract between the United States government and any local farmers that would allow the border patrol or the magistrate or the district court judge to order a farmer be removed to a farm to work, to live and work?

A No, there are not.

Q Would it be fair to say that the key to your decision in this case to authorize the release of all but one of the material witnesses was the fact that the defendant had essentially confessed to each and every element of the charge for which he's now before this court?

A Yes. That was the real cornerstone of the decision, definitely.

Q And the second factor would be the fact none of the material witnesses at that time indicated anything of help to the defendant?

A That's correct.

Q And had you considered what posture the government would be in if in fact the confession that the defendant gave [25] in this case was suppressed?

A Yes, I had, and if the confession was suppressed, then there would be a strong possibility that the government might have to dismiss the case. But I'm sufficiently

confident in the investigative techniques used by the anti-smuggling unit, agents in the Chula Vista sector, as far as interrogating witnesses and seeing that all their constitutional rights are complied with, that I thought that was a very, very slim risk, and well worth taking in light of the alternative, which was to hold these other witnesses in custody for at least ten days.

MR. NUNEZ: Nothing further.

MR. WEINERMAN: I have a few more, your Honor.

REDIRECT EXAMINATION

BY MR. WEINERMAN:

Q Mr. Doyle, the confession again was not before you in writing. It was a synopsis given to you by the investigator?

A Yes. It was a synopsis, that's correct. But it was, as I indicated, those elements of it I was aware of that he admitted that he knew the people were in the vehicle, that he himself was an illegal alien, they were illegal aliens, that he was driving for a free ride, and he was in the midst of a smuggling organization when all this happened, [26] that he was aware of all of those components. But I didn't have it verbatim.

Q Were you told by the investigator that the defendant said he was in the midst of the smuggling operation?

A No. I'm just characterizing that from what he told me and my experience as an assistant United States attorney, it was obvious to me this was an organized type smuggling venture, because he said he was driving for somebody else in order to get a free ride, a common ploy used by alien smugglers.

Q Did the investigator tell you the defendant said he knew all the people in his car were illegal aliens?

A Again, those weren't the exact words used. But the confession contained an admission by the defendant that he knew what was going on. He knew what was happening.

Q You've read the confession?

A I've read the confession.

Q Nowhere are the exact words used, "I knew all these people were illegal aliens"?

A That's correct.

Q And you were not told those exact words by the investigator?

A No.

Q As you read the confession today, it indicates that [27] the defendant did not come into the United States illegally, but with the people he was transporting?

A That's correct. He did not.

Q The investigator didn't tell you that was the case, did he?

A No, he did not.

Q And one of the elements of illegal transportation of aliens is that a person has to have reasonable grounds knowing that the people came into the United States within the last three years?

A That's correct.

Q So based on what the investigator told you, you made a determination based on your experience that the defendant made a complete confession?

A That's correct.

Q But the investigator did not ask him these exact questions and get answers which established the essential elements out of the defendant's own mouth?

A Let's put it this way: The investigator did not take the five essential elements of 1324(A)(2) and ask him in the exact terms of each element whether he did this, this, this and this.

But he did ask him for a synopsis—for the sequence of events—and when he gave him the sequence of events, it fit into each of the essential elements, so [28] that's my basis for saying he confessed to each of the essential elements.

Q You were in part relying on the agent's analysis of the statement of the defendant?

A No. My analysis. He told me what the aliens said, and based on my experience, trying many such cases, I'm very familiar with the essential elements.

Q A little more about the material witness procedure in this district. You indicated that the witnesses, if they're held for defense interview, are kept anywhere from five to ten days before the arraignment on the indictment?

A The aliens are kept as few as five, because almost always by the time they get to court they've been in custody two to three days, and the indictment has to be held within ten days, and it usually gets right up against the ten days. So usually they're held, I would say, somewhere between eight and ten.

Q The main concern seems to be keeping people in custody?

A That's correct.

Q Has the government ever experimented calling a special grand jury so the case can be indicted instead of ten days later, three days later?

A Well, I mean, there's certainly all kinds of hypothetical, very costly ways in which this problem can [29] be handled. In my judgment, those aren't called for in a situation where it's obvious on the face of the facts that the witnesses can be of no benefit to the defendant.

Q So the government has never tried a special grand jury, or at least getting the case before a grand jury, whether special or regular grand jury?

A Well, we also put it before the magistrate, almost always assign it as close as they can. In other words, they know when the grand jury meets, Wednesdays and Fridays, and they'll have the arraignment on the indictment the Thursday after the Wednesday grand jury, if that's feasible, and if not feasible, they'll often set it for arraignment on the indictment Friday at two o'clock, which then at least they're not held, and it doesn't go over any further than it has to. Everyone makes what efforts they can with the constraints of the system as it exists now.

Q Has the government ever considered having preliminary examinations a few days after the arrest in lieu of a grand jury proceeding?

A That would be impractical, due to the large volume of cases, I believe.

Q So that's never been tried, to your knowledge?

A Not to my knowledge.

Q Now, these people who are being held as material witnesses, they have in fact violated the law, haven't they?

[30] A Yes, they violated the law by illegally entering the United States.

Q They can get up to six months in jail for that, if convicted?

A Yes.

Q And the government, instead of prosecuting them, just holds them as material witnesses in order to prosecute the driver to transport?

A That's correct.

MR. WILLIAMSON: Excuse me. May I have a moment?

Excuse me for interrupting, your Honor, but a bail review matter came up downstairs involving several witnesses.

MR. WEINERMAN: I have no further questions.

RECROSS-EXAMINATION

BY MR. NUNEZ:

Q Mr. Doyle, you're familiar with the indictment review process that exists in the United States attorney's office, that it has existed since you've been there?

A Yes, I am.

Q Is it not true it takes a considerable period of time for an assistant U.S. attorney to review a potential felony case to decide if it should be indicted, and if so, to contact the necessary witnesses, prepare the indictment, get

all the paper work done, get the witnesses to the grand [31] jury?

A Absolutely there's an absolute need for the time lag there; otherwise, cases which should not be indicted, either due to insufficient evidence or certain mitigating facts, would be indicted. So it's absolutely necessary there be an interim in which cases are evaluated before presented for indictment.

Q And in your judgment could that be done within three days of the arrest?

A That would be very difficult, just because of the large geographic area here in San Diego and all of the various outlying stations which send in alien smuggling cases that the varying shifts that all these agents work. Many work midnights to eight, and you've got to locate them, run them down, and they've got to get a call back to you, and you have to check out all the things, and also—there was one other thing I was thinking that would make that very difficult. Slipped my mind.

Q Let me ask another question. During your employment as an assistant U.S. attorney, have you become aware of the fact it also takes time for defense attorneys to make physical contact with the aliens at the MCC or wherever they're being held in order to interview them prior to this materiality hearing?

A That's correct. As a matter of fact, it's not [32] unusual for one reason or other they haven't been able to make such contact, and as a result, there's a continuance and the materiality hearing is held past the date or arraignment, 15 or 20 days after the date of the arrest.

Q So it's not unusual for defense attorneys to come into court before the magistrate at the time of the first materiality hearing and ask for an extension of time because he'd been unable, for whatever reason, to interview them, all of the aliens in the case?

A That's correct.

Q So it's not only the indictment process that affects the materiality hearing?

A That's right.

THE COURT: Mr. Doyle, I just have one question.

THE WITNESS: Yes, your Honor.

THE COURT: You said that in this case if the confession were—well, found to be involuntary, and thus suppressed, that you would be required to dismiss the case. That's not quite true, is it?

THE WITNESS: Not required—if I used the word "required," I misspoke myself. I think we would get ourselves in a difficult position to prove our case, because the proof of the case is relied on, to some extent—

THE COURT: Still have one witness?

THE WITNESS: Still have one witness and also the [33] investigating agent who saw the defendant driving, but a nice chunk of evidence is gone, and we would have to re-evaluate the case.

THE COURT: You may step down.

Now, have you anything further, Mr. Weinerman?

MR. WEINERMAN: No, your Honor, I don't have anything further. I was wondering if the Court—I'm kind of in a jam. I have to go for a bail review hearing. Could we have a recess or could Mr. Williamson fill in? Perhaps—everybody's been waiting for me an hour. I'm on the spot. There's three government witnesses, and everybody is angry with me. Perhaps people are angry with me here.

THE COURT: No, I'm not angry. I'd like to start my other case as quickly as possible.

Mr. Doyle, how many witnesses do you have?

MR. DOYLE: I have two. I would think they wouldn't take more than 20 minutes total.

THE COURT: And do you have anything else?

MR. WEINERMAN: No, I don't have anything else, your Honor.

MR. DOYLE: Your honor, I could make an offer of proof, and perhaps, for the purpose of simply this mo-

tion, we could stipulate that the agents would testify in conformance with the I-213 which was filled out on this offense. That's what they're going to testify to. I have a copy of it here.

[35] THE COURT: Mr. Williamson, I presume you have nothing further?

MR. WILLIAMSON: No further evidence, your Honor, no.

THE COURT: Mr. Williamson, do you care to argue the matter?

MR. WILLIAMSON: Your Honor, based on my conference with Mr. Weinerman, my remarks will be very brief.

He advised me the Court has heard this matter before, that you are in possesion of the points and authorities, and he's asked me to just make a few limited comments, if it please the Court.

THE COURT: Certainly.

MR. WILLIAMSON: The issue in this case is clear. Your Honor has sat on many cases involving the so-called *Mendez-Rodriguez* issue.

THE COURT: Including *Tsutogawa.*

MR. WILLIAMSON: That's correct. The whole premise of this motion from our standpoint is no matter what the facts of the case might indicate now, or even at the time of trial, that the fundamental right of a defendant charged with a crime that could put him in prison for a period of years through due process, should not be determined unilaterally by a prosecutor.

This is an adversary system of justice. You sit in the middle to determine what is just and proper if you're [36] the trier of the facts as the judge or the jury does. One adversary on each side is supposed to, by representing vigorously his or her side of the case, is supposed to put the best and strong a case forward for their side, and in the case of Mr. Doyle, he represents the government of the United States who's trying to put our client in jail by convicting him of the present charge.

Our job as advocate is, of course, to present as strong a case for him as well, and hopefully, justice will be the ultimate result.

The problem is, no matter what the facts are in any case is when you let the advocate—the procecutor, the representative of one side of the law—the government is just one side of the lawsuit in this case, nothing more, and is not entitled to in our system of justice any greater credibility by virtue of being the government—they are just a plaintiff in a lawsuit.

The problem is when you allow the plaintiff's lawyer to decide unilaterally who the defendant's witnesses are going to be—you tried civil suits, I know, as a lawyer before you took the bench, as well as many criminal cases. No one would stand for the plaintiff's attorney being allowed to select by removing from the process of the Court the jurisdiction of the Court who the defendant's witnesses might or might not be.

[37] When you translate that into a criminal case, take the unconstitutional dimensions of due process, the sixth amendment right to confront and cross-examine, it is flatly impossible for any of us here in these proceedings today to say exactly what those people who were let go might say now or might say at the time of trial. Despite what Mr. Doyle says insofar as what the aliens say when they're arrested and what they might say at trial, I have sat through far too many of those trials and had witnesses flip one side of the other when they get up in the box, take the oath in front of the jury, both in my favor and against me, to presume to tell the Court today I know those people that were arrested back on the day our client was would testify exactly as they did that day. And what they've done here is to have removed the opportunity from our client to put those people on the stand and testify in such a way as he might be found not guilty of the crime of knowingly transporting aliens.

No question but what there is other evidence in this case, but he is now deprived of the opportunity to attempt to put the government to its proof and put on independent witnesses, even other than himself if he chooses not to take the stand to challenge the government's case and convince a jury or other trier of the facts they have not met the burden of proving their case beyond a reasonable doubt.

[38] If those witnesses were to get on the stand in a trial and say they had not made arrangements or told him they were citizens, or they had a green card, any number of things we can only speculate on, because they're not here and that's the issue, then there is the possibility that the trier of the fact may conclude that the government had not met its burden.

What Mr. Doyle is asking you to say is "Phooey on that. When we have a good case, what we, the plaintiff's lawyers decide is a good case, what the defendant thinks or may be able to do in the future, even though facing jail, is inconsequential. We, the government, in our infinite wisdom as advocates and parties to a suit decide what's fair for everything, including the trier of the fact, that is a violation of due process and of our client's sixth amendment rights.

That's all I have to say.

THE COURT: Mr. Doyle:

MR. DOYLE: Yes, your Honor.

Mr. Williamson's remarks were very eloquent and draw upon many very broad similar statements that are in *Mendez-Rodriguez* and the 9th Circuit decision in *Tsutagawa*. However, there is a lot of appellate law under the bridge, so to speak, since then that's come down, and in particular in late 1979 and early 1980, and I'm referring to *United* * * *

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87

No. 81-450

SUPREME COURT OF THE UNITED STATES

UNITED STATES, PETITIONER

v.

RICARDO VALENZUELA-BERNAL

ORDER ALLOWING CERTIORARI

Filed November 2, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

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Opposition

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81-450

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

RICARDO VALENZUELA-BERNAL,

RESPONDENT.

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

JOHN J. CLEARY
CRAIG E. WEINERMAN
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101
Telephone (714) 234-8467

Attorneys for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-450

UNITED STATES OF AMERICA,

PETITIONER

- vs -

RICARDO VALENZUELA-BERNAL,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Government contends that the "conceivable benefit" test as applied by the Ninth Circuit in this case is nothing more than an automatic reversal rule without a requirement that some prejudice be demonstrated. [Petition at p. 9] According to this argument, a defendant would have to theorize what the released witnesses would have said had the government not deported them by their own unilateral action. The Ninth Circuit Court of Appeals in United States v. Mendez-Rodriquez, 450 F.2d 1 (9th Cir. 1971), recognized this impossibility by

stating:

> ...Appellant was, by government action, deprived of the opportunity to interview said witnesses. Appellant couldn't know what these witnesses might say, if anything. We are in the same position as the appellant. We decline to indulge in any speculation that the interviews would, or would not, have been fruitful to the defense.

Id. at 5. See also United States v. Calzada, 579 F.2d 1358, 1362 (7th Cir. 1978). Through the years, the Ninth Circuit Court of Appeals has retreated from the automatic reversal rule requiring no showing of prejudice and has formulated the "conceivable benefit" test. See United States v. Gonzalez, 671 F.2d 1358, 1363 (9th Cir. 1980). This test recognizes the difficulty facing defendants in speculating what released witnesses would say while at the same time denying windfall dismissals of indictments when the facts and circumstances demonstrate that the released witnesses could not have possibly benefitted the defense case. If there is no connection in time and place between the offense allegedly committed and the released witnesses, the Ninth Circuit does not require dismissals of the indictment. See United States v. Martinez-Morales, 632 F.2d 112 (9th Cir. 1980) (released witnesses not potential eyewitnesses to the inducing and encouraging offense); United States v. Orozco-Rico, 589 F.2d 433 (9th Cir. 1978) (released witnesses could not have conceivably helped a defendant charged with status offenses, therefore no prejudice due to their release); United States v. Gonzalez, 617 F.2d 1358 (9th Cir. 1980) (dismissal of some counts of the indictment affirmed because alien may have been a witness to the conduct alleged in those counts and dismissal of other counts reversed because released witnesses had no connection to those counts and could not have conceivably benefitted the defendants with their testimony); United States McQuillan, 507 F.2d 30 (9th Cir. 1974) (released material witnesses had nothing to do with marijuana smuggled by the defendants, therefore no prejudice by their release); United States v. Castellanos-Machorro, 512 F.2d 1181 (9th Cir. 1975)

(released material witnesses had no connection with motel harboring operation that was basis of the indictment); United States v. Sanchez-Murillo, 608 F.2d 1314 (9th Cir. 1979) (released material witnesses had no connection with the defendant, didn't witness any acts performed by the defendant, was not with the defendant at the time of his arrest). An analysis of these cases demonstrates that indictments are dismissed in the Ninth Circuit only when the released witnesses were eyewitnesses to or active participants in the offense and, therefore, were in a position to benefit the defendant through their testimony.

The government suggests that a defendant must show not only potential prejudice as a result of the release of the witnesses but also he must demonstrate definite prejudice. [Petition at p.9] In Roviaro v. United States, 353 U.S. 53 (1957), this court reversed a narcotics conviction based on a violation of the Sixth Amendment confrontation clause. In determining whether the informant's privilege was outweighed by the defendant's need for disclosure of the identity of the informant, this court did not require the defendant to state with specificity how the informant could have helped his case. It was enough for this court that the informant's close connection and participation to the alleged events could have benefitted the defendant:

> His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' from the tree to John Doe's car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the government to decide. Id. at 64 (emphasis added).

In Roviaro, this court determined that the informant was an active participant in the offense, was present during its occurrence and, therefore, his testimony might have helped the defendant's case. In this case, the Ninth Circuit Court of Appeals determined that the deported aliens were eyewitnesses to and active participants in the offense charged and,

therefore, there was a strong possibility that they could have provided relevant and helpful information concerning the events surrounding the commission of the offense. United States v. Valenzuela-Bernal, 647 F.2d 72, 75 (9th Cir. 1981). This court has suggested that a "substantial threat" of prejudice may be sufficient to result in dismissal of an indictment when constitutional rights are violated. United States v. Morrison, ____U.S. _____, 101 S.Ct. 665, 668 (1981). The "conceivable benefit" standard applied by the Ninth Circuit Court of Appeals in this case recognizes that the loss of material witnesses to an offense by unilateral government action amounts to a substantial threat of prejudice to the defendant's case.

The government erroneously contends the defendant never demonstrated how he had been prejudiced by the release of the material witnesses to Mexico before he had an opportunity to interview them. [Petition at p.9] However, during the hearing on the motion to dismiss the indictment, the defense attempted to develop, through the testimony of the remaining material witness, Enrique Romero-Morales, that the defendant lacked knowledge that the material witnesses were illegal aliens who had entered the United States illegally within the last three years.[1/] Romero testified that he did not enter the United States illegally at the same time as the defendant (R.T. 12)[2/] Romero testified that he did not converse with the defendant either at the house they were staying at prior to their departure or in the vehicle in which the defendant transported the other persons. (R.T. 13-14) There was no

---

1/ Title 8, United States Code, § 1324(a)(2), prohibits the knowing transportation of illegal aliens by someone who knows the passengers are in fact illegal aliens who have been in the United States for less than three years.

2/ R.T. refers to the reporter's transcript of the motion hearings conducted on 2 June 1980 and 12 June 1980.

indication from Romero's testimony that he ever advised the defendant that he was an illegal alien who entered the United States within the last three years. Prior to Romero's testimony, defense counsel informed the district court that Romero's testimony "may enlighten the court as to what the other witnesses might have said." In argument before the district court on the motion to dismiss the indictment, defense counsel gave his reason for wanting the released witnesses available for interview before trial and how they could have benefitted the defense:

> The opportunity from (sic) our client to put those people on the stand and testify in such a way as he might be found not guilty of the crime of knowingly transporting aliens.
>
> ...But he is now deprived of the opportunity to attempt to put the government to its proof and put on independent witnesses, even other than himself if he chooses not to take the stand to challenge the government's case and convince a jury or other trier of facts they have not met the burden of proving their case beyond a reasonable doubt.
>
> If those witnesses were to get on the stand in a trial and say they had not made arrangements or told him they were citizens, or they had a green card, any number of things we can only speculate on, because they're not here and that's the issue, then there is the possibility that the trier of the fact may conclude that the government had not met its burden.

(Supp. R.T. 37-38)[3/] In its decision, the Ninth Circuit Court of Appeals recognized that the defendant asserted at the district court level the defense that the missing witnesses may have corroborated his contention that he was unaware of the status of the passengers as illegal aliens who had entered the United States illegally within the last three years. United States v. Valenzuela-Bernal, supra at 74-75. The presentation of a plausible defense theory to the district court and the court of appeals distinguishes this case from United States v. Avila-Dominguez, 610 F.2d 1266 (5th Cir. 1980), where apparently the defense did not demonstrate at either the trial or appellate level that the testimony of the missing witnesses would be helpful to their case.

3/ Supp. R.T. refers to the supplemental reporter's transcript of the motion hearing conducted on 12 June 1980.

The government next contends that the Assistant United States Attorney's assessment of the facts surrounding the defendant's apprehension served to adequately balance the defendant's Sixth Amendment rights and the rights of the aliens not to be incarcerated for an undue period of time. [Petition at p. 13] The record demonstrates the prosecutor acted under erroneous information. First, he was advised by a criminal investigator that "there had been a complete confession by the defendant." (Supp. R.T. 7) However, defendant's statement is more correctly characterized as an admission because he never confessed to transporting the aliens with knowledge that they were illegal aliens who had been in the United States less than three years. United States v. Valenzuela-Bernal, supra at 75. The government prosecutor did not read a copy of the defendant's "confession" before he made his unilateral decision to release the material witnesses because a transcript was not available until approximately two-and-a-half months later. (Supp. R.T. 9) So, in reality, the Assistant United States Attorney, the only member of the prosecuting team who was a lawyer, completely delegated the assessment of the defendant's statement to a criminal investigator, apparently untrained in the law.

Similarly, the prosecutor was summarily advised by the criminal investigator that the three material witnesses all said the same thing about the facts and circumstances surrounding the apprehension of the defendant. (Supp. R.T. 9) Once again, no witness statements were available to the prosecutor before he made his decision to release the witnesses. He relied completely on the assessment of a criminal investigator, apparently untrained in the law, who, like the prosecutor, had never represented a defendant in a criminal case. (Supp. R.T. 12)

If the prosecutor's true intentions were to lessen the governmental burden and expense of detaining and housing witnesses and relieving the witnesses themselves of that burden, far more conventional methods of dealing with the problem were

available. The prosecutor could have directed the criminal investigator to request the defendant to waive his right to have the government retain custody of the three material witnesses. See United States v. Lujan-Castro, 602 F.2d 877 (9th Cir. 1979). At the time of the defendant's arrest, the arresting agency had such a written waiver form available for the defendant to sign to release the material witnesses. (Supp. R.T. 16) This method was rejected by the prosecutor as being "unnecessary." (Supp. R.T. 17). Also available to the prosecutor was the method of issuing the material witnesses in question parole letters permitting them to return to the United States at a later time. (Supp. R.T. 12) This was rejected by the prosecutor because it was "simply not worth the effort." (Supp. R.T. 13). Another alternative available to the government, but rejected by the government prosecutor in this case, was temporary detention of the material witnesses at work farms as suggested by the Ninth Circuit Court of Appeals in United States v. Tsutagawa, 500 F.2d 420, 423 (9th Cir. 1974). Finally, federal law protects illegal aliens from unnecessary and prolonged incarceration by prohibiting their detention in the absence of a showing by either side that the aliens' testimony is material. Further, even alien witnesses whose testimony is material cannot be detained if their testimony can be adequately preserved by depositions. See 18 U.S.C. § 3149.

A far more fundamental issue is raised by the government's contention that the government prosecutor should be permitted to decide what witnesses will be held for purposes of the litigation. In an adversary system of justice, one side should not be permitted to decide unilaterally what witnesses will be available for the other side. This court had stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purposes for challenging their testimony, he has the right to present his own witnesses to establish the defense, this right is a fundamental element of due

process of law. Washington v. Texas, 388 U.S. 14, 18-19 (1968).

It has been said that :

> Witnesses, particularly eyewitnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity to interview them. Here the defendant was denied the opportunity which, not only the statute, but essential fairness and due process require that he have.
>
> The criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. Current tendency in the criminal law is in the direction of discovery of the facts before trial and elimination of surprise at trial. A related development in the criminal law is the requirement that the prosecution not frustrate the defense in its preparation of its case. (Footnotes omitted). Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966).

It is unthinkable that in a personal injury case a court would approve the conduct of an insurance company in inteviewing witnesses to an automobile accident and then, through some unilateral action, rendering them unavailable to the plaintiff's lawyer. However, that is just what the government is suggesting be done in a criminal case where civil liberties and freedom are at stake. The government is asking for ex parte power to decide what witnesses are important, critical, and material, and release the remainder before the defendant has an opportunity to interview them. In an adversary system of justice, these critical decisions should not be delegated to the government prosecutor.

In sum, while it is recognized that dismissal of an indictment is a drastic remedy, it is proper in this case because the unilateral and intentional action of the government in deporting eyewitnesses to the offense goes to the integrity of the fact-finding process. The defendant's right to compulsory process of witnesses under the Sixth Amendment and due process of law under the Fifth Amendment cannot be rectified by depriving the government the fruits of its transgressions as it can in situations where evidence is obtained in violation of the Fourth Amendment provisions

prohibiting unreasonable search and seizure, the Fifth Amendment privilege against self-incrimination or the Sixth Amendment right to counsel. There is no evidence to suppress in this case. The defendant has lost witnesses due to the unilaterial action of the government. The sanction of dismissal of the indictment is a reasonable remedy under the facts of this case.

CONCLUSION

For the foregoing reasons, respondant respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

Dated: 2 October 1981

JOHN J. CLEARY
CRAIG E. WEINERMAN
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101
Telephone (714) 234-8467

Attorneys for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-450

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

RICARDO VALENZUELA-BERNAL,

RESPONDENT.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Pursuant to 18 U.S.C. § 3006A(d)(6) and Rule 46 of this Court, the Respondent, Ricardo Valenzuela-Bernal, asks leave to file the Memorandum in Opposition fo the Petition for Writ of Certiorari filed by Petitioner without prepayment of fees or costs and to proceed in forma pauperis. Respondent was represented by counsel appointed pursuant to 18 U.S.C. § 3006A in the district court and on appeal to the Ninth Circuit Court of Appeals.

Respectfully submitted,

DATED: 2 October 1981

JOHN J. CLEARY
CRAIG E. WEINERMAN
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101
Telephone (714) 234-8467

Attorneys for Respondent

Petitioner's Brief

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No. 81-450

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

RICARDO VALENZUELA-BERNAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

CARTER G. PHILLIPS
Assistant to the Solicitor General

CAROLYN L. GAINES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the government violates a defendant's right to due process or to compulsory process by deporting illegal alien witnesses if officials of the government have interviewed the witnesses and reasonably concluded that they can provide no evidence on behalf of the defendant different from that available from alien witnesses who are retained to testify at trial, or if the defendant has been unable to show that the unavailable witnesses are material to his defense.

2. Whether, assuming that the deportation of illegal aliens violated the defendant's rights, dismissal of the indictment was the appropriate remedy.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	3
Summary of argument	6
Argument:	
I. Deportation of the two illegal aliens did not violate respondent's right to due process or compulsory process	10
A. Background	10
B. No violation of constitutional rights occurs unless the unavailability of potential defense witnesses is due to improper government conduct	14
C. Even if the government should be held to act at its peril in deporting potential alien witnesses, a defendant is entitled to no relief unless he can show the materiality of evidence lost to him as a result of the deportation	23
II. Even if respondent's rights were violated by the deportation of these witnesses, dismissal of his indictment is an inappropriate remedy	36
Conclusion	41

TABLE OF AUTHORITIES

Cases:

Bacon v. *United States*, 449 F.2d 933	18
Bowles v. *United States*, 439 F.2d 536	27
Brady v. *Maryland*, 373 U.S. 83	28
Branzburg v. *Hayes*, 408 U.S. 665	25

Cases—Continued Page

Brown v. *United States*, 375 F.2d 310, cert. denied, 388 U.S. 915 28
Byrd v. *Wainwright*, 428 F.2d 1017 27-28
Cochran, Application of, 434 F. Supp. 1207 18
Crumpton v. *United States*, 138 U.S. 361 ..... 9, 27
Dearinger v. *United States*, 468 F.2d 1032 26
Dennis v. *United States*, 384 U.S. 855 32
Earl v. *United States*, 361 F.2d 531, cert. denied, 388 U.S. 921 ..... 16, 17
Giglio v. *United States*, 405 U.S. 150 35
Government of Virgin Islands v. *Smith*, 615 F.2d 964 ..... 16, 28
Hoskins v. *Wainwright*, 440 F.2d 69 27
Isaacs v. *United States*, 159 U.S. 487 26
Jencks v. *United States*, 353 U.S. 657 32
Killian v. *United States*, 368 U.S. 231 16
Maguire v. *United States*, 396 F.2d 327 14
McAllister v. *Brown*, 555 F.2d 1277 25
McCray v. *Illinois*, 356 U.S. 300 24
Moore v. *Illinois*, 408 U.S. 786 28
Napue v. *Illinois*, 360 U.S. 264 35
Roviaro v. *United States*, 353 U.S. 53 ..... 9, 24, 25, 34
Singleton v. *Lefkowitz*, 583 F.2d 618 15
Suarez v. *United States*, 582 F.2d 1007 25
United States v. *Agurs*, 427 U.S. 97 ..... 9, 28, 35
United States v. *Augenblick*, 393 U.S. 348 ..... 7, 16
United States v. *Avila-Dominguez*, 610 F.2d 1266 .. 17, 20, 33-34
United States v. *Ayala*, 643 F.2d 244 25
United States v. *Bautista*, 509 F.2d 675, cert. denied, 421 U.S. 976 16
United States v. *Beasley*, 550 F.2d 261, cert. denied, 434 U.S. 938 16
United States v. *Blue*, 384 U.S. 251 ..... 10, 38
United States v. *Bryant*, 439 F.2d 642 ..... 16, 32
United States v. *Bumatay*, 480 F.2d 1012 27
United States v. *Buras*, 633 F.2d 1356 25
United States v. *Burr*, 25 F. Cas. 187 (No. 14,694) .. 26
United States v. *Calzada*, 579 F.2d 1358 ..... 13, 18, 33
United States v. *Carrillo-Frausto*, 500 F.2d 234 17

Cases—Continued Page

United States v. *Castellanos-Machorro*, 512 F.2d 1181 12-13
United States v. *Cerrito*, 612 F.2d 588 29
United States v. *Comosona*, 614 F.2d 695 29
United States v. *Coppola*, 479 F.2d 1153 34
United States v. *Dukow*, 453 F.2d 1328, cert. denied, 406 U.S. 945 30
United States v. *Estrella*, 567 F.2d 1151 25
United States v. *Galardi*, 476 F.2d 1072 30
United States v. *Gay*, 567 F.2d 916 14
United States v. *Gleason*, 616 F.2d 2 16
United States v. *Gonzalez*, 555 F.2d 308 25
United States v. *Gonzales*, 606 F.2d 70 25
United States v. *Gonzales*, 617 F.2d 1358 12
United States v. *Greco*, 298 F.2d 247, cert. denied, 369 U.S. 820 14
United States v. *Haldeman*, 559 F.2d 31 ..... 9, 26, 27
United States v. *Hegwood*, 562 F.2d 946, cert. denied, 434 U.S. 1079 34
United States v. *Henao*, 652 F.2d 591 17-18
United States v. *Herman*, 589 F.2d 1191, cert. denied, 441 U.S. 913 28
United States v. *Krasn*, 614 F.2d 1229 29
United States v. *Lang*, 589 F.2d 92 16
United States v. *Lenz*, 616 F.2d 960 16
United States v. *Loud Hawk*, 628 F.2d 1139 30
United States v. *Lovasco*, 431 U.S. 783 ..... 7, 9, 15, 29, 37
United States v. *Lujan-Castro*, 602 F.2d 877 20
United States v. *Makekau*, 429 F.2d 1403, cert. denied, 400 U.S. 904 14
United States v. *Marion*, 404 U.S. 307 ..... 7, 15, 29, 37
United States v. *Martinez-Morales*, 632 F.2d 112 12
United States v. *McGough*, 510 F.2d 598 30
United States v. *McPhatter*, 473 F.2d 1356 26
United States v. *McQuillan*, 507 F.2d 30 13
United States v. *Mendez-Rodriguez*, 450 F.2d 1 ..... *passim*
United States v. *Morrison*, 449 U.S. 361 ..... 10, 37, 38, 40
United States v. *Orozco-Rico*, 589 F.2d 433 22
United States v. *Perea*, No. 80-1431 (10th Cir. July 27, 1981), cert. denied, No. 81-5463 (Nov. 16, 1981) 17

Cases—Continued Page

United States v. *Rhodes*, 398 F.2d 655, cert. denied, 394 U.S. 962 14
United States v. *Roberts*, 503 F.2d 598, cert. denied, 419 U.S. 1113 27
United States v. *Rosa*, 493 F.2d 1191, cert. denied, 419 U.S. 850 27
United States v. *Sanchez-Murillo*, 608 F.2d 1314.... 12
United States v. *Shuford*, 454 F.2d 772 ..... 9, 27
United States v. *Smith*, 27 F. Cas. 1192 (No. 16,342) 26
United States v. *Taylor*, 562 F.2d 1345 27
United States v. *Tsutagawa*, 500 F.2d 420 ..... 21, 31
United States v. *Turkish*, 623 F.2d 769 ..... 16, 17
United States v. *Verduzco-Macias*, 463 F.2d 105.... 16, 17
United States v. *Wolfson*, 322 F. Supp. 798, aff'd, 454 F.2d 60, cert. denied, 406 U.S. 924 14
United States v. *Wright*, 588 F.2d 31, cert. denied, 440 U.S. 917 28
United States ex rel. Parson v. *Anderson*, 354 F. Supp. 1060, aff'd, 481 F.2d 94, cert. denied, 414 U.S. 1072 ..... 14, 15
Warden v. *United States*, 391 F.2d 747 26
Washington v. *Texas*, 388 U.S. 14 24
Welsh v. *United States*, 404 F.2d 414 34-35

Constitution, statutes and rule:

United States Constitution:

Fifth Amendment, Due Process Clause ..... *passim*
Sixth Amendment, Compulsory Process Clause.. *passim*

8 U.S.C. 1324(a)(2) 2, 3, 4, 6, 30
8 U.S.C. 1325 ..... 20, 22
18 U.S.C. 3149 ..... 18, 21
Fed. R. Crim. P. 17(b) 27

Miscellaneous:

Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 Iowa L. Rev. 1 (1969)..... 18
I E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* (1977) 40

Miscellaneous—Continued

Page

2 B. Schwartz, *The Bill of Rights: A Documentary History* (1971) 26

United States Department of Justice, *U.S. Border Patrol Management of the Mexican Border* (1981) 19

Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71 (1974) 26

Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978) 15

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 647 F.2d 72. The oral opinion of the district court denying respondent's motion to dismiss the indictment (Pet. App. 11a-14a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a) was entered on June 5, 1981. On July 24, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including September 3, 1981. The petition for a writ of certiorari was filed on that date and was granted on November 2, 1981 (J.A. 87). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor * * *.

8 U.S.C. 1324 provides in pertinent part:

> (a) Any person, * * *
>
> (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law * * *

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs * * *.

STATEMENT

Respondent was indicted in the United States District Court for the Southern District of California on one count of transporting an illegal alien, in violation of 8 U.S.C. 1324(a)(2). Following a bench trial on stipulated facts, respondent was convicted. He was sentenced to five years' imprisonment, with all but 179 days suspended, to be followed by five years' probation. On appeal, a panel of the Ninth Circuit reversed respondent's conviction and ordered the indictment against him dismissed (Pet. App. 1a-9a).

1. The government's evidence showed that on March 29, 1980, at about 5:00 p.m., an automobile approached the Border Patrol checkpoint at Temecula, California (J.A. 46-47). Agent Fernandez motioned for the car to stop, but it continued moving through the checkpoint at a slow speed (J.A. 47). As the car went past, the agent saw respondent driving the car, and five other people lying down inside it (J.A. 48-49, 50). When Agent Fernandez attempted to open the car door on the driver's side, the car sped away (J.A. 49-50). Two other agents pursued the car at a high rate of speed for about a mile (J.A. 27, 52-53). The car then stopped abruptly, and all of the occupants of the car fled on foot (J.A. 54). Two passengers escaped, but respondent and the other three passengers were apprehended (J.A. 55-56; Pet. App. 2a).

Following the arrest, respondent and the other passengers were interviewed by criminal investigators. After receiving *Miranda* warnings, respondent agreed to answer questions under oath and to have the interview taped. Respondent admitted to the investigator that he had entered the country illegally on March 23

1980, with the assistance of a smuggler and that he had agreed to drive the passengers in the car in return for not having to pay for his own illegal entry (J.A. 25-26, 28). When asked why he did not stop at the checkpoint, respondent answered "since I was bringing the people I already knew that I had had it/too late/it was done" (J.A. 27).

The investigator called an Assistant United States Attorney in the Southern District of California, described to him the circumstances surrounding respondent's arrest, and told him about respondent's statement. The investigator also informed him that the three passengers who were arrested with respondent all told basically the same story and did little more than identify respondent as the driver of the car (J.A. 63-66).

The Assistant United States Attorney told the investigator to select any one of the three passengers to remain so that the government would have a non-hearsay basis for establishing that the transported individual was an illegal alien (J.A. 66). He also decided on the basis of the investigator's statements that no useful purpose would be served by requiring the other two aliens to be incarcerated pending respondent's trial, and he therefore authorized their release back into Mexico (J.A. 68). In accordance with the Assistant United States Attorney's instructions, only one of the three illegal aliens, Enrique Romero-Morales, was detained. Respondent was charged in a one-count indictment with transporting Romero-Morales in violation of 8 U.S.C. 1324(a)(2).

2. Prior to trial, respondent filed a motion to dismiss the indictment, alleging violations of the Fifth and Sixth Amendments (J.A. 7). In support of his

claim, respondent argued that the return of the illegal aliens deprived him of the opportunity to interview actual witnesses to the crime and to determine what aid they could be to his defense. In addition, respondent claimed that by returning the illegal aliens to Mexico the government denied him the right to compulsory process to obtain their presence at his trial. Respondent made no attempt to suggest with any specificity what knowledge these two witnesses had or what testimony they might have provided that could have helped him in this case (J.A. 9-16).

A full evidentiary hearing was held at which Romero-Morales, the two investigators from the Border Patrol checkpoint, and the Assistant United States Attorney testified. Romero-Morales testified that he never spoke with respondent during the time they were together (J.A. 38). Consistent with this testimony, the government offered to stipulate that "none of the persons released ever told the Defendant they were illegally present in the United States * * *" (J.A. 40). Respondent did not comment on this offer. After hearing the testimony, the district court denied respondent's motion to dismiss the indictment. The court reasoned (Pet. App. 12a):

> [H]is sixth amendment rights are clearly not violated. It wouldn't make any difference what those other witnesses said if in fact the defendant is only going to be charged with the one witness who's here, because he's confessed to the transporting of these individuals, including the defendant [sic] that's here.

Thereafter, without presenting any defense to the crime charged, respondent agreed to submit the case to the district court, sitting without a jury, on the

basis of a stipulated record (J.A. 22-23).[1] The court found respondent guilty (Pet. App. 15a-16a).

3. The court of appeals reversed, holding that the district court should have granted respondent's motion to dismiss the indictment (Pet. App. 1a-9a). On the basis of *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971), and other decisions following it,[2] the court of appeals concluded that if testimony from the absent aliens could "conceivably benefit" respondent, then their deportation by the government prior to trial violated respondent's Fifth and Sixth Amendment rights (Pet. App. 5a-7a). The court found (*id.* at 8a; emphasis in original) that it was conceivable that the illegal aliens might have testified that respondent did not know that they were "*illegal* aliens who had been in this country for less than three years," as required by 8 U.S.C. 1324 (a)(2).[3] The court of appeals concluded that the necessary remedy for the "prejudice" caused by the loss of these witnesses was dismissal of the indictment (Pet. App. 7a).

SUMMARY OF ARGUMENT

For more than a decade the Ninth Circuit has declared it a violation of a defendant's right to due process and compulsory process for the government to deport prior to trial illegal aliens whose testimony could conceivably have benefitted the defendant. See

---

[1] Respondent stipulated that the testimony given at the hearing by Romero-Morales and the two Border Patrol investigators would be the same at trial (J.A. 22-23).

[2] See cases cited in Pet. 7 n.4.

[3] The court of appeals did not discuss the prosecution's offer to stipulate that none of the persons released ever told respondent that they were illegally present in the United States.

United States v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971). The *Mendez-Rodriguez* rule as applied assumes that the deportation is without justification and also excuses the defendant from any meaningful obligation to supply the court with some concrete and plausible indication of what testimony the missing witness could have provided that would have been material to his defense. In addition, the automatic remedy for this supposed violation of the defendant's rights is dismissal of the indictment against him. All three aspects of the Ninth Circuit's approach to these cases is misguided.

I.

A. Initially, it is our position that the government commits no constitutional violation—either of the Fifth or Sixth Amendment—when it deports illegal aliens who are potential witnesses in a criminal case, if it has done so only after making a reasonable good faith determination that the witnesses possess no material exculpatory evidence. It is our submission that the claim of a constitutional violation in these circumstances must be supported by a showing that the government's action was improperly motivated or at the least unjustified in light of the circumstances. Such an analysis is in line with this Court's analogous decisions involving pre-indictment delay and lost evidence. See *United States* v. *Lovasco*, 431 U.S. 783 (1977); *United States* v. *Marion*, 404 U.S. 307 (1971); *United States* v. *Augenblick*, 393 U.S. 348 (1969).

There are in fact substantial reasons why the government does not incarcerate illegal alien witnesses who appear to possess no material exculpatory evidence. During the course of any given year, tens of thousands of illegal aliens are apprehended in cir-

cumstances that would support a prosecution for transporting or harboring them. The impact of the Ninth Circuit's rule has been to require as a condition to prosecution extended incarceration of these individuals, at considerable human cost to them and at great societal costs in terms both of substantial expenditures of money and grave impact on seriously overcrowded jail facilities. This has the further consequence of forcing prosecutors to forgo otherwise valid and appropriate prosecutions for lack of adequate facilities in which to incarcerate the large numbers of illegal alien witnesses whose deportation might result in dismissal of any prosecution.

What makes these costs particularly intolerable is that witnesses who are detained solely to satisfy the requirements of *Mendez-Rodriguez* are almost never actually called as defense witnesses at trial. The reality is that in most cases the illegal aliens become useful to the defense only after they have been expelled from the United States, in which event they provide the predicate for windfall relief such as was afforded by the court of appeals in this case.

In sum, far from being an improper deprivation of respondent's constitutional rights, the decision to return two of his illegal alien passengers to Mexico, after determining that they appeared to possess no material evidence bearing upon his illegal transportation of the third alien, represented a proper and reasonable balancing of the interests of respondent and of the aliens and the duties of the government.

B. Even if it is concluded that the government acts at its peril in deporting illegal aliens who could conceivably be witnesses at the defendant's trial, it is nevertheless indispensable to finding a constitutional violation that the defendant make a concrete

showing that the deported witnesses could provide material evidence in his favor. A reasonable proffer of materiality is a basic requirement of any other claim asserting a defendant's interest in having missing evidence available. Thus, in order to learn the identity of a confidential informant (*Roviaro* v. *United States*, 353 U.S. 53 (1957)); to obtain a continuance for a temporarily absent witness (*United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (en banc)); to receive a severance so that a co-defendant may testify on his behalf (*United States* v. *Shuford*, 454 F.2d 772 (4th Cir. 1971)); or even to establish the right to subpoena a witness (*Crumpton* v. *United States*, 138 U.S. 361 (1891)), the defendant must show how the otherwise unavailable witness could actually benefit his defense. Similar materiality requirements have been adopted in decisions of this Court involving evidence unavailable to the defense because of pre-indictment delay or nondisclosure by the prosecution. See *United States* v. *Lovasco*, *supra*; *United States* v. *Agurs*, 427 U.S. 97 (1976).

There is no reason not to require the respondent to make as much of a showing in this case. Respondent was in the company of the unavailable witnesses at all times relevant to this prosecution. Thus, if the witnesses could testify on his behalf, defendant is uniquely situated to know what that testimony is likely to be. Nonetheless, neither respondent nor the court of appeals has been able to suggest anything that the two missing witnesses could testify to that could possibly create a reasonable doubt as to his guilt in transporting the third illegal alien, who was available as a witness at trial.

II.

Even if the conduct of the government in deporting these witnesses constituted a technical violation of respondent's constitutional rights, it is wholly inappropriate to remedy that violation by ordering respondent's indictment dismissed. This Court requires the remedy to be tailored to neutralize the taint created by the particular violation. See *United States* v. *Morrison*, 449 U.S. 361, 365 (1981). Thus, if the respondent has lost certain testimony, then the most to which he should be entitled is a stipulation as to what the missing witness would say. The government in fact offered to make such a stipulation, but respondent ignored it. In any event the facts of this case can under no circumstances justify the utter disregard by the court of appeals for "the public interest in having the guilty brought to book." *United States* v. *Blue*, 384 U.S. 251, 255 (1966).

ARGUMENT

I. DEPORTATION OF THE TWO ILLEGAL ALIENS DID NOT VIOLATE RESPONDENT'S RIGHT TO DUE PROCESS OR COMPULSORY PROCESS

A. Background

This case presents an issue at the intersection of the Due Process Clause of the Fifth Amendment and the Compulsory Process Clause of the Sixth Amendment.[4] The former, insofar as here relevant, pro-

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[4] Respondent has contended that the deportation of the two illegal aliens in his case violated both his due process and his compulsory process rights. The Ninth Circuit, both here and in prior similar cases, has made no effort to differentiate between these rights, but has simply concluded that both the Fifth and Sixth Amendments were violated. We have some doubt that the issue presented properly arises un-

tects the defendant against unfair prosecutorial conduct. The latter secures to a criminal defendant the right to compel the attendance of witnesses and the production of physical evidence in his behalf at trial. But the right to be accorded due process, in the context of claimed governmental misconduct, cannot be evaluated without considering the reasons for the challenged conduct. Similarly, the right to compulsory process has never been treated as an absolute right to be enforced without regard to the reasons for the unavailability of evidence or its likely materiality. The decision of the court of appeals in this case, however, both ignores completely the possible justifications for the government's actions in deporting the captured illegal aliens and assigns an unprecedented absoluteness to the right to present witnesses.

The Ninth Circuit's holding stems from its decision a decade ago in *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (1971). That case involved the apprehension of six illegal aliens in a car driven by

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der the Compulsory Process Clause of the Sixth Amendment. All of this Court's prior decisions interpreting that provision have dealt with the defendant's right to secure the compelled attendance of witnesses or production of physical evidence that was within reach of the court's process at the time he invoked that process.

Any theory on which this case could properly be converted into a compulsory process case seems to us to depend upon allegations of impropriety by the government in placing otherwise compellable evidence beyond the reach of the court. Such a rationale renders the compulsory process claim essentially indistinguishable from the due process claim, requiring in either case consideration of the reasons for the government's actions, the showing of prejudice to the ability of the defense to put on its case, and the most appropriate means to remedy any prejudicial violation of the defendant's rights that may be found to have occurred.

the defendant. Three of the illegal aliens were returned to Mexico and the other three were retained as witnesses and testified for the prosecution. On review of the defendant's conviction, the court of appeals reversed and ordered the indictment dismissed.

The defendant in *Mendez-Rodriguez* claimed that he was driving in the desert in the early morning hours after a business trip to Tijuana, Mexico, and that he stopped to pick up a hitchhiker who had five companions with him. According to the defendant, the six passengers did not converse with him. Thus, he did not know that they were illegal aliens.[5] Without any discussion whatever of the reasons for the government's action, the court held that the deportation of three of the passengers was impermissible. In addition, it declined to speculate as to whether the missing witnesses "would, or would not, have been fruitful to the defense." 450 F.2d at 5.

Subsequent decisions of the Ninth Circuit similarly failed to consider the reasons why the government deported the illegal aliens, although they did arguably modify the strict approach in *Mendez-Rodriguez* by indicating the need to make some minimal showing of prejudice. Most of these cases involved situations in which the defendant could suggest literally no testimony relevant to the case that the witnesses might supply. See *United States* v. *Martinez-Morales*, 632 F.2d 112 (1980); *United States* v. *Gonzales*, 617 F.2d 1358 (1980); *United States* v. *Sanchez-Murillo*, 608 F.2d 1314 (1979); *United States* v.

[5] According to the Border Patrol agent, the defendant had told him that the six had indicated that they had no papers, and therefore he took a circuitous route to avoid their detection. 450 F.2d at 4.

Castellanos-Machorro, 512 F.2d 1181 (1975); *United States* v. *McQuillan*, 507 F.2d 30 (1974). In all of those cases, which were cited by the court of appeals (Pet. App. 6a n.2), there was affirmative evidence that the missing "witnesses" were not present at the time of the crime and thus could supply no testimony at all regarding the central events at issue. Nevertheless, it remains the rule of the Ninth Circuit that generally, regardless of why the witnesses were released, dismissal is required if the defendant, his counsel, or the court can imagine any "conceivable benefit" a deported illegal alien witness might have provided the defendant (Pet. App. 7a).[6]

As a consequence of the Ninth Circuit's rulings, the decision to pursue a prosecution for illegal transportation or harboring of aliens (or for other offenses to which illegal aliens may be witnesses) carries with it the requirement that all illegal aliens who have been taken into custody must be incarcerated as material witnesses—even though reasonable inquiry discloses that they appear to possess no material exculpatory evidence—for a period of time sufficient to allow defense counsel to interview them. The practice that has generally been adopted by United States Attorneys in the Ninth Circuit has been to incarcerate such witnesses for a period of at least ten days. Often, because of the busy schedules of defense counsel, the aliens are detained for longer periods. As is discussed more fully below, this prac-

[6] The Seventh Circuit apparently does not even require this much. As Judge Cummings pointed out in his dissenting opinion in *United States* v. *Calzada*, 579 F.2d 1358, 1365 (1978), the defendants in that case were not even required to offer a "plausible theory" as to how those missing witnesses would have aided their case.

tice leads to serious problems of jail overcrowding; rarely, however, is the testimony of aliens detained only under the compulsion of *Mendez-Rodriguez* actually presented on behalf of a defendant at trial.

B. No Violation Of Constitutional Rights Occurs Unless The Unavailability Of Potential Defense Witnesses Is Due To Improper Government Conduct

1. Any discussion of the issues presented by this case must begin with a recognition that it is by no means extraordinary—let alone unconstitutional—for defendants in criminal cases to be unable to present all the evidence they might wish to. Evidence may be unavailable because privileged, potential defense witnesses may die or be too ill to testify, documents may have been destroyed, or witnesses or documents may be located beyond the reach of the court's process. Ordinarily, none of these occurrences affords any basis for a claim that it is unconstitutional to try the defendant despite his inability to adduce such possibly exculpatory evidence. See, *e.g.*, *United States* v. *Gay*, 567 F.2d 916, 919 (9th Cir. 1978); *United States* v. *Makekau*, 429 F.2d 1403 (9th Cir.), cert. denied, 400 U.S. 904 (1970); *United States* v. *Rhodes*, 398 F.2d 655, 658 (7th Cir. 1968), cert. denied, 394 U.S. 962 (1969); *Maguire* v. *United States*, 396 F.2d 327 (9th Cir. 1968); *United States* v. *Greco*, 298 F.2d 247, 251 (2d Cir.), cert. denied, 369 U.S. 820 (1962); *United States ex rel. Parson* v. *Anderson*, 354 F. Supp. 1060, 1073-1074 (D. Del. 1972), aff'd, 481 F.2d 94 (3d Cir.), cert. denied, 414 U.S. 1072 (1973); *United States* v. *Wolfson*, 322 F. Supp. 798, 819-820 (D. Del. 1971), aff'd, 454 F.2d 60 (3d Cir.), cert. denied, 406 U.S. 924 (1972). Instead, the basic safeguard in such circumstances is the requirement that the government must prove a

defendant's guilt beyond a reasonable doubt. See *United States ex. rel. Parson* v. *Anderson*, *supra*, 354 F. Supp. at 1074.

2. We acknowledge, of course, that the court of appeals' ruling in these cases does not turn simply on the unavailability of the witnesses, but rather depends on the fact that they are unavailable because of the action of the government. The theory seems to be that since " 'the state is to blame for the absence of a witness, it must bear the consequences of the loss.' " *Singleton* v. *Lefkowitz*, 583 F.2d 618, 624 (2d Cir. 1978) (quoting Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 596 (1978)).[7] There are, however, other analogous types of cases in which the government has in some manner contributed to the unavailability of evidence that the defense wishes to adduce, but in which that factor is not itself sufficient to establish a constitutional violation. For instance, pre-indictment delay by the prosecution may result in prejudicial loss of evidence to the defense, but this Court has held that no constitutional violation is made out unless it is also shown that the delay was unfairly designed to gain a tactical advantage at trial. See *United States* v. *Lovasco*, 431 U.S. 783, 795 & n.17 (1977); *United States* v. *Marion*, 404 U.S. 307, 324 (1971).

A similar approach is employed in evaluating claims based upon the government's loss or destruction of evidence prior to trial. In such cases the fact of government involvement does not by itself inexor-

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[7] In *Singleton* a new trial was ordered because the missing witness likely could be located. The court recognized, however, that in deportation cases the remedy often is dismissal of the indictment. 583 F.2d at 624.

ably lead to the conclusion that the defendant's rights have been violated. On the contrary, a careful judicial examination is made of the reason for the government's action, and, if the government's conduct is found to be in accord with accepted practices or to have been undertaken in good faith, no sanction is imposed. See, *e.g.*, *United States* v. *Augenblick*, 393 U.S. 348, 355-356 (1969); *Killian* v. *United States*, 368 U.S. 231, 242-243 (1961); *United States* v. *Verduzco-Macias*, 463 F.2d 105, 107 (9th Cir. 1972); *United States* v. *Bryant*, 439 F.2d 642, 652 (D.C. Cir. 1971).

Another circumstance in which the government's action may deprive the defendant of evidence he wishes to adduce at trial arises when the government refuses to immunize a potential defense witness who has invoked his self-incrimination privilege and refused to testify. The government's affirmative decision not to immunize, and thereby make available to the defendant, the testimony of such a witness has been uniformly regarded, except in the most extraordinary circumstances, as completely permissible. See, *e.g.*, *United States* v. *Turkish*, 623 F.2d 769, 772 (2d Cir. 1980); *United States* v. *Lenz*, 616 F.2d 960 (6th Cir. 1980); *United States* v. *Gleason*, 616 F.2d 2 (2d Cir. 1979); *United States* v. *Lang*, 589 F.2d 92, 96 n.1 (2d Cir. 1978); *United States* v. *Beasley*, 550 F.2d 261, 268 (5th Cir.), cert. denied, 434 U.S. 938 (1977); *United States* v. *Bautista*, 509 F.2d 675 (9th Cir.), cert. denied, 421 U.S. 976 (1975); *Earl* v. *United States*, 361 F.2d 531 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967). But cf. *Government of Virgin Islands* v. *Smith*, 615 F.2d 964, 972 (3d Cir. 1980). This result reflects judicial recognition of the substantial governmental interest in having discre-

tion to choose which suspected wrongdoers should be prosecuted and of the independent protection afforded the defendant by the prosecution's heavy burden of proof. See *United States* v. *Turkish*, *supra*, 623 F.2d at 774; *Earl* v. *United States*, *supra*, 361 F.2d at 534. Thus, if the government's action depriving a defendant of a witness is done to further important governmental interests and not for the purpose of injuring the defendant's case, there is no violation of the defendant's rights.

3. This brings us to the central flaw in the Ninth Circuit's approach to these cases, *viz.*, the assumption that the government's decision to deport illegal aliens who may be witnesses is an improper, unilateral action of the government in unjustifiable disregard of the defendant's rights. Nothing could be further from the truth. The general preference for releasing illegal aliens who do not appear to be material witnesses for a defendant is in fact reasonably necessary to further important governmental interests.

First, release of the illegal aliens directly protects substantial human values by not requiring these individuals to be incarcerated unless necessary to a just resolution of the criminal case. See *United States* v. *Carrillo-Frausto*, 500 F.2d 234, 235 (9th Cir. 1974); *United States* v. *Verduzco-Macias*, *supra*, 463 F.2d at 107. The weightiness of these concerns is readily identifiable when the individual being detained is a juvenile, a mother of young children, or a pregnant woman. *United States* v. *Carrillo-Frausto*, *supra*, 500 F.2d at 235; *United States* v. *Perea*, No. 80-1431 (10th Cir. July 27, 1981), slip op. 7, cert. denied, No. 81-5463 (Nov. 16, 1981); *United States* v. *Avila-Dominguez*, 610 F.2d 1266, 1268 (5th Cir. 1980). See also *United States* v. *Henao*, 652 F.2d

591, 594 (5th Cir. 1981); *United States* v. *Calzada*, 579 F.2d 1358, 1361 (7th Cir. 1978). However, the detention of any head of a family for a period of days without any income can work a substantial hardship on the family, and indeed the incarceration of any person without some substantial justification is wholly unwarranted. See *Bacon* v. *United States*, 449 F.2d 933, 944-945 (9th Cir. 1971); *Application of Cochran*, 434 F. Supp. 1207, 1212 (D. Neb. 1977); Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 Iowa L. Rev. 1 (1969). See generally 18 U.S.C. 3149.

While the Ninth Circuit's rule requires the detention of potential witnesses only for so long as is necessary to afford defense counsel an opportunity to interview them and determine whether to ask that they be further detained for trial, the practical effect of this requirement is hardly inconsequential. In order to comply with the rule, United States Attorneys generally have adopted a policy of keeping the illegal aliens incarcerated for ten days, unless the defendant agrees to their release sooner or promptly pleads guilty to some charge. This is regarded as a reasonable period to allow defense counsel to be appointed, to investigate the case, and to interview the potential witnesses. At the end of ten days, a hearing generally is held to determine whether the witnesses are material and whether they should continue to be held in jail pending trial. See 18 U.S.C. 3149. Based on this practice, according to the United States Marshal in the Southern District of California, where the instant case arose, illegal aliens were detained an average of more than five days in fiscal year 1979, and detentions for considerably longer periods were not uncommon (J.A. 21). When one considers that

almost none of these "material witnesses" ever testifies on behalf of a defendant at trial, the needless human cost of the extended detentions required by the Ninth Circuit's *Mendez-Rodriguez* rule becomes apparent.

Apart from the adverse consequences to the individuals involved, the retention of alien witnesses is very expensive. Because of the emphasis placed on halting the flow of illegal aliens into this country, there are large numbers of aliens captured every year. U.S. Department of Justice, *U.S. Border Patrol Management of the Mexican Border* 1, 6 (1981) (approximately one million illegal aliens detained for each of the past three years). The data supplied to the district court by the United States Marshal show that for the 1979 fiscal year more than 5000 illegal alien material witnesses were committed to his custody in the Southern District of California. Indeed, almost half of all inmates in that district were incarcerated as material witnesses (J.A. 18). Because of the problems of overcrowding resulting from the *Mendez-Rodriguez* line of cases, federal detainees in that district often must be housed in federal prisons in other districts or in state-operated jails (J.A. 21). Yet according to the United States Attorneys Office, in fiscal year 1979 there were only 36 trials in the Southern District of California for Title 8 offenses. Even making the generous assumption that at each of those trials an illegal alien who was kept in the country solely to comply with *Mendez-Rodriguez* was actually called and gave material testimony on the defendant's behalf, the number of detained witnesses who are material in the truest sense, *i.e.*, that they have testimony that is sufficiently helpful that they are called to be a defense witness, is miniscule in contrast

to the total number detained.[8] The government is thus forced to assume "the great burden and expense of detaining and housing alien witnesses * * *" (*United States* v. *Avila-Dominguez*, *supra*, 610 F.2d at 1269, to protect only the shadow of the right to compulsory process and not its substance.[9]

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[8] In fact, the United States Attorney in the Southern District of California informed us that he could not recall a single case in which a witness detained to comply with *Mendez-Rodriguez* had ever been called to testify on behalf of a defendant. He was certain, however, that the actual number could not exceed more than a couple per year.

We also think it important to emphasize that the figures mentioned above regarding the number of illegal aliens detained as material witnesses do not distinguish between those whom the government has decided, independent of the constraints imposed by *Mendez-Rodriguez* and its progeny, to detain because they appear to have material evidence to offer on behalf of either the prosecution or the defense at trial, and those who are held solely to avoid dismissal of criminal charges. But the latter group undoubtedly represents a substantial proportion of the total.

[9] There are other alternatives to keeping all of these illegal aliens, but they all have problems that make them less than satisfactory. First, the government can forgo prosecution altogether or attempt to obtain a guilty plea on a lesser charge (see page 22, *infra*). Often, the individual who is transporting the aliens is also himself illegally present in the country and can be prosecuted for that under 8 U.S.C. 1325. Of course, this solution requires the government to forgo prosecution of a charge it regards as more appropriate to the crime committed.

The government also can attempt to obtain a waiver from the defendant at the time of his arrest. See *United States* v. *Lujan-Castro*, 602 F.2d 877 (9th Cir. 1979). This solution is also flawed. First, some defendants decline to allow release of witnesses for reasons wholly unrelated to their materiality. Sometimes the defendant is too frightened to make a decision or he simply wants to have someone he knows be detained

The Ninth Circuit's rule also significantly constrains the government's prosecutorial discretion. Because of budget limitations and the unavailability of adequate detention facilities, it is simply impossible as a practical matter to prosecute many cases involving the transportation or harboring of large numbers of illegal aliens, where all the aliens must be incarcerated for a substantial period of time to avoid dismissal of the charges, even though the prosecution's case may be overwhelming.[10] As a consequence,

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with him. Thus, witnesses are detained unnecessarily. Second, by relying on waiver, the government simply presents a second factual problem for the courts. In addition to materiality, the court also must consider whether the defendant's waiver was knowing and understanding. Despite the holding in *Lujan-Castro*, we have some doubt whether a recently arrested individual can make a reasonably informed decision, prior to consultation with counsel, about the potential utility of detained witnesses to his defense. Thus, waiver is not a fully satisfactory solution to this problem.

In addition, the witnesses can be deposed on videotape in accordance with 18 U.S.C. 3149 and subsequently released. This is not, however, a perfect answer because depositions can only be taken after defense counsel is appointed and has had time to prepare for them. Thus, typically a detention of ten days or longer would still be necessary. Moreover, depositions are at best of marginal value in cases like this one. When the witness has as little evidence as the three in this case, a deposition is basically a waste of time and money. In cases where the witness has genuinely material evidence, it is likely that, absent exigent circumstances, both the defendant and the government would prefer to have the witness available for trial.

[10] In *United States* v. *Tsutagawa*, 500 F.2d 420 (9th Cir. 1974), the government apprehended 39 aliens who allegedly were being harbored by the defendants on their farm. Four of the aliens were retained as potential trial witnesses, while the other 35, who apparently had no knowledge different from

many valid and appropriate prosecutions are forgone; alternatively, the defendant may be offered the opportunity to plead to a misdemeanor even though a felony charge is considered appropriate.[11] Needless to say, such prosecutorial decisions hardly bolster the effectiveness of the deterrent against alien smuggling activities.

Not only has the Ninth Circuit failed to give due regard to the substantial interests served by the government's general policy of returning most of these aliens promptly rather than incarcerating them, but also its decisions have consistently ignored the process by which the government determines whether witnesses should be detained. Instead, the court has simply assumed that the government's unilateral action necessarily undermines the defendant's rights. As this case well illustrates, however, government agents generally take reasonable measures to ascertain whether an alien has material, exculpatory evidence to offer the defendant before deciding to return him.

Here, Border Patrol agents arrested respondent with several illegal aliens who had been riding in his car. Respondent essentially admitted that he had

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or additional to that of the detained aliens, were returned to their countries of origin. The Ninth Circuit dismissed the indictment for the failure to keep all of the aliens as witnesses. As *Tsutagawa* demonstrates, the larger the scale of the offense, the more likely the defendants are to escape prosecution. There, a successful prosecution would have required the detention of 39 "material witnesses."

[11] If the defendant is himself an illegal alien, he is often prosecuted merely for the misdemeanor of illegal entry into the United States, in violation of 8 U.S.C. 1325, an offense to which the Ninth Circuit's *Mendez-Rodriguez* doctrine does not apply. *United States* v. *Orozco-Rico*, 589 F.2d 433, 435-436 (9th Cir. 1978).

committed the crime. The aliens were interrogated carefully, and it was plain that each had basically the same story to tell—a story that corresponded to respondent's own admissions. The agents then went a step further and called the Assistant United States Attorney to ask advice. Based on all of these facts—none of which have been controverted by respondent—the Assistant United States Attorney properly ordered two of the three, chosen at random, to be released back to Mexico. The record reflects neither bad faith nor even a neglectful or cavalier attitude toward respondent's rights.

In light of the forgoing considerations, we submit that it is entirely proper for the government, after determining in reasonable good faith that arrested illegal aliens do not appear to possess material exculpatory evidence, to expel those individuals from the country rather than detaining them for a considerable period of time as material witnesses so that defense lawyers may interview them. If we are correct that such action represents a justifiable response to the circumstances confronting the government in such cases, there is no basis for holding that the unavailability of the "witnesses" violates a defendant's constitutional rights to either due process or compulsory process.

C. Even If The Government Should Be Held To Act At Its Peril In Deporting Potential Alien Witnesses, A Defendant Is Entitled To No Relief Unless He Can Show The Materiality Of Evidence Lost To Him As A Result Of The Deportation

Even if this Court were to disagree with the forgoing position and hold that the government deports alien witnesses at its peril, it plainly should remain incumbent upon a defendant claiming relief on the

basis of the unavailability of the witness to make a concrete and substantial showing that the witness might have offered material exculpatory evidence. Nothing in the Constitution guarantees the defendant an absolute right to have any witness he chooses testify at his trial. By its own terms the compulsory process right is limited to obtaining witnesses in the defendant's "favor," and there is no reason why the obligation to afford due process should further extend that right.

It is clear that the government is not required to guarantee the availability at trial of every witness whom a criminal defendant chooses to have testify. See *McCray* v. *Illinois*, 386 U.S. 300, 311 (1967); *Roviaro* v. *United States*, 353 U.S. 53, 60-61 (1957). See also pages 14-15, *supra*. Instead, the defendant consistently has been required to show that the unavailable witness is "material" to his defense. Thus, in the seminal decision interpreting the Compulsory Process Clause, *Washington* v. *Texas*, 388 U.S. 14, 23 (1967), this Court specifically described the testimony of the witness as "relevant and material to the defense." Indeed, in *Washington*, the defendant had been charged with murder, and the witness was prepared to testify that he, the witness, was the person who had shot the deceased, and that the defendant had attempted to stop the shooting and had left the scene before the gun was fired.

Similarly, in *Roviaro* v. *United States*, *supra*, 353 U.S. at 62, the Court held that before the government would be required to disclose the identity of a confidential informant, the court had to take into consideration "the possible defenses [and] the possible significance of the informer's testimony * * *." The Court concluded after a careful scrutiny of the record that, in the circumstances of that case, the witness's

testimony was material because he had set up the heroin transaction that was the basis for the indictment, he was the sole witness to the exchange other than the defendant and the agent, and there was reason based on the circumstances surrounding the sale to suspect entrapment. *Id.* at 62-65. See also *Branzburg* v. *Hayes*, 408 U.S. 665, 698 (1972).

Since *Roviaro*, defendants routinely are denied access to confidential informants when they are unable to establish a substantial basis to believe the informant could supply material exculpatory testimony. See, *e.g.*, *United States* v. *Ayala*, 643 F.2d 244, 247 (5th Cir. 1981) (conjecture or supposition is not adequate to show materiality); *United States* v. *Buras*, 633 F.2d 1356, 1360 (9th Cir. 1980) (suspicion or conjecture is insufficient for materiality); *United States* v. *Gonzales*, 606 F.2d 70, 76 n.3 (5th Cir. 1979); *Suarez* v. *United States*, 582 F.2d 1007, 1012 (5th Cir. 1978) (informant was only a "marginal" observer); *United States* v. *Estrella*, 567 F.2d 1151, 1153 (1st Cir. 1977) (defendant must show "concrete" circumstances); *McAllister* v. *Brown*, 555 F.2d 1277, 1278 (5th Cir. 1977) (no showing that testimony was "necessary"); *United States* v. *Gonzalez*, 555 F.2d 308, 314 (2d Cir. 1977) (speculation is not enough). In all of these cases, the defendant was obligated to make some specific showing of materiality in order to learn the identity of the confidential informant. In each case the district court's finding that an insufficient showing of materiality had been made by the defendant was upheld by the court of appeals.

There are numerous analogous situations in which defendants are unable to have a particular witness available to testify because they have not supplied the court with an adequate explanation of how the

witness might significantly advance the defense. For instance, in order for a defendant to receive a continuance of his trial to allow him to obtain the presence of a missing witness, he is required to make a clear showing that the witness's testimony would be favorable and material. See, *e.g.*, *United States* v. *Haldeman*, 559 F.2d 31, 83 & n.125 (D.C. Cir. 1976) (en banc) (testimony must be "significant"); *United States* v. *McPhatter*, 473 F.2d 1356, 1358 (5th Cir. 1973); *Dearinger* v. *United States*, 468 F.2d 1032, 1034-1035 (9th Cir. 1972); *Warden* v. *United States*, 391 F.2d 747, 750 (10th Cir. 1968). See also *Isaacs* v. *United States*, 159 U.S. 487, 489 (1895).[12] In *Haldeman*, the court held that denial of a continuance, which would have allowed the President to testify on behalf of his subordinates, was permissible because the defendants generally had failed "to indicate what testimony they hoped to elicit," and the indications were that any testimony would have been "cumulative" and "could not have disputed the central

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[12] The history surrounding the adoption of the Compulsory Process Clause of the Sixth Amendment is sparse, but the little that there is demonstrates that the Framers did not intend the right to have witnesses available to be absolute. As an amendment to the clause, it was proposed "to leave it in the power of the accused to put off the trial to the next session, provided he made it appear to the court that the evidence of the witnesses, for whom process was granted but not served, was material to his defence." 2 B. Schwartz, *The Bill of Rights: A Documentary History* 1114 (1971). This was rejected as both unnecessary and inappropriate. See Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 98 (1974). Thus, the requirement that the evidence must be "material" to the defendant's case has been assumed since the adoption of the right. See *United States* v. *Smith*, 27 F. Cas. 1192, 1228-1229 (D.N.Y. 1806) (No. 16,342) (Paterson, J.); *United States* v. *Burr*, 25 F. Cas. 187, 194 (D. Va. 1807) (No. 14,694) (Marshall, C.J.).

propositions in the Government's case." 559 F.2d at 85-86. For all that appears, the D.C. Circuit could have been describing this case.

Similarly, an indigent defendant cannot require the government to subpoena any and all witnesses he may designate. Before the government is required to assume that burden, the defendant must make a "satisfactory showing * * * that the presence of the witness is necessary to an adequate defense." Fed. R. Crim. P. 17(b). This requires at least some indication that the witness will supply evidence that would truly benefit the defendant's case and that the evidence will not be cumulative. See, *e.g.*, *Crumpton* v. *United States*, 138 U.S. 361, 364-365 (1891); *United States* v. *Taylor*, 562 F.2d 1345, 1361-1362 (2d Cir. 1977); *United States* v. *Rosa*, 493 F.2d 1191, 1194 (2d Cir.), cert. denied, 419 U.S. 850 (1974); *Hoskins* v. *Wainwright*, 440 F.2d 69, 71 (5th Cir. 1971).

Criminal defendants are routinely denied the opportunity to call co-defendants to testify at their trial because of the co-defendant's privilege against self-incrimination. *United States* v. *Roberts*, 503 F.2d 598, 600 (9th Cir. 1974), cert. denied, 419 U.S. 1113 (1975); *Bowles* v. *United States*, 439 F.2d 536 (D.C. Cir. 1970). In order for a defendant to obtain a severance of his trial and thereby force the government to bear the cost and inconvenience of conducting separate trials, he must make a specific showing that the co-defendant can and will supply material evidence on his behalf if the cases are severed. See, *e.g.*, *United States* v. *Bumatay*, 480 F.2d 1012, 1013 (9th Cir. 1973); *United States* v. *Shuford*, 454 F.2d 772, 776 n.2 (4th Cir. 1971); *Byrd* v.

Wainwright, 428 F.2d 1017, 1020 (5th Cir. 1970); *Brown* v. *United States*, 375 F.2d 310, 317 (D.C. Cir. 1966), cert. denied, 388 U.S. 915 (1967).[13]

This general approach of requiring a showing that the evidence in question is material to the defendant's case is not unique to situations implicating compulsory process interests. A defendant cannot successfully assert a due process violation for missing evidence generally, even where the prosecution possessed but failed to disclose the evidence, unless he can show more than "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial * * *." *United States* v. *Agurs*, 427 U.S. 97, 109-110 (1976). See also *Moore* v. *Illinois*, 408 U.S. 786, 798 (1972); *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). It cannot possibly be right that a defendant is entitled to dismissal of the charges on account of deportation of aliens on a substantially

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[13] Another situation where the compulsory process right is subordinated to the government's interests is where the defendant seeks to have the government grant use immunity to a witness who otherwise will not testify. As noted above (pages 16-17, *supra*), most courts have simply rejected the idea that a defendant can force the government to grant immunity. But in the one case where the defendant's assertion was upheld, the Third Circuit required a showing that the proffered testimony would be clearly exculpatory and that the testimony would be essential to the defense. *Government of Virgin Islands* v. *Smith*, 615 F.2d 964, 972 (3d Cir. 1980). See also *United States* v. *Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978), cert. denied, 441 U.S. 913 (1979); *United States* v. *Wright*, 588 F.2d 31 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979).

lesser showing than is required to secure a new trial when the government has withheld exculpatory evidence.

Perhaps even more instructive are the decisions of this Court and others involving the problems posed by pre-indictment delay. In *United States* v. *Lovasco*, *supra*, the defendant claimed that two witnesses—one who had participated in the exchange of guns and one who had been an observer—had died during the time the government had delayed in formally accusing him of possessing stolen firearms. He argued that he had been severely prejudiced by the delay. This Court rejected the defendant's argument, finding that regardless of prejudice there is no violation of the defendant's due process rights in the absence of improper motivation for the delay. See also *United States* v. *Marion*, 404 U.S. 307, 324 (1971).

The pre-indictment delay cases implicate essentially the same interests as are involved here, *i.e.*, the ability of the defendant to produce evidence at trial. What is especially pertinent to the present argument is that even if a defendant can show that delay was a product of governmental misconduct, the drastic remedy of dismissal of the charges against him is available only if he can also demonstrate actual prejudice to his defense caused by the improper delay. See, *e.g.*, *United States* v. *Lovasco*, *supra*, 431 U.S. at 790 ("prejudice is generally a necessary but not sufficient element of a due process claim"); *United States* v. *Krasn*, 614 F.2d 1229, 1235 (9th Cir. 1980); *United States* v. *Comosona*, 614 F.2d 695, 697 n.3 (10th Cir. 1980); *United States* v. *Cerrito*, 612 F.2d 588, 592-593 (1st Cir. 1979);

United States v. *McGough*, 510 F.2d 598, 604 (5th Cir. 1975); *United States* v. *Galardi*, 476 F.2d 1072, 1079 (9th Cir. 1973); *United States* v. *Dukow*, 453 F.2d 1328 (3d Cir.), cert. denied, 406 U.S. 945 (1972).

Notwithstanding this long and clear line of authority that requires materiality or actual prejudice as an element of a compulsory process or due process claim, the Ninth Circuit's "conceivable benefit" test virtually dispenses with any meaningful requirement of materiality or prejudice in cases where dismissal is sought because the government has released illegal aliens back to their own country. See Pet. App. 7a; *United States* v. *Loud Hawk*, 628 F.2d 1139, 1153 n.4 (9th Cir. 1979) (Kennedy, J., concurring); *United States* v. *Mendez-Rodriguez*, *supra*, 450 F.2d at 5.

This is well illustrated by the instant case. Respondent was charged with unlawfully transporting Romero-Morales, in violation of 8 U.S.C. 1324(a)(2). The elements of the offense consist of (1) transporting a person within the United States, (2) knowing that the person being transported is unlawfully in the United States, and (3) knowing or having reason to believe that the person's last entry into the United States occurred within three years of the date of the transportation. Considering the circumstances of respondent's apprehension and his own statements to the investigating agents, it is fair to say that he was caught red-handed. Moreover, Romero-Morales was detained and available to testify at trial, and his stipulated testimony amply corroborated the other, overwhelming evidence of respondent's guilt. As for the two passengers who were returned to Mexico, it has never been suggested that they knew respondent or Romero-Morales or that they had ever had any

conversation with either of them. Under these circumstances, it borders on the ludicrous to suppose that the two passengers could possibly have provided any material, or even relevant, evidence regarding Romero-Morales' status as an illegal alien or respondent's knowledge thereof.

If respondent's identical interest in having these witnesses had arisen in any other context, his claim would have been dismissed out of hand. He could not require the government to disclose these "marginal" observers' identities if they had been confidential informants. It is highly unlikely that any court would have granted respondent a continuance to allow him to have these witnesses available to testify, and certainly denial of such a motion would not constitute an abuse of discretion. Indeed, in light of the availability of Romero-Morales as a witness, it is doubtful that respondent could have required the government to pay to subpoena the two missing witnesses, whose testimony seems plainly cumulative, even had they been within reach of the court's process. But the Ninth Circuit on this showing not only declared that respondent's rights were violated, but required his indictment to be dismissed.

3. One apparent reason why the Ninth Circuit virtually dispenses with the need to show materiality or prejudice is its view that the practice challenged here represents an unjustified assertion by the government of "the unfettered ability * * * to make the decision unilaterally" which witnesses the defendant might regard as material. *United States* v. *Tsutagawa*, *supra*, 500 F.2d at 423.[14] Thus, the Ninth Circuit implicitly

[14] The Ninth Circuit's decisions hint that the government has acted wrongfully in these cases, *United States* v. *Mendez-Rodriguez*, *supra*, 450 F.2d at 5, and thus a prophylactic rule is necessary to prevent abuse. For the reasons we have de-

draws an analogy between this situation and the refusal to produce available evidence in *Dennis* v. *United States*, 384 U.S. 855, 872-873 (1966), and *Jencks* v. *United States*, 353 U.S. 657, 671 (1957). The cases are not comparable. As Judge Kilkenny pointed out in his dissent in *Mendez-Rodriguez*, *supra*, nothing in that case indicated that the deportation "deprived the appellant of 'access to a storehouse of relevant fact.'" 450 F.2d at 6 (quoting *Dennis* v. *United States*, *supra*, 384 U.S. at 873). In any event, the characterization that the government claims "unfettered discretion" is not accurate. The government in these cases claims the right to return alien witnesses only if investigation discloses no reasonable basis for believing that the witnesses possess material exculpatory evidence. If the decision to return the witness is made unreasonably or in bad faith, and if the defense suffers actual prejudice as a result of the government's wrongful action, then the court will find that the defendant's rights have been violated.

The other reason offered for reducing the burden on the defendant to demonstrate that the unavailable witness was "material" was explained in *United States* v. *Mendez-Rodriguez*, *supra*, 450 F.2d at 5:

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tailed more fully above (pages 17-21, *supra*), this position is unfounded. Indeed, in none of these cases has the defendant argued that the government acted in bad faith; certainly the record would not support such a claim here. Thus, even assuming that it might be proper, in order to deter a demonstrated pattern of systematic, official misconduct, to adopt a rule declaring that bad faith deportations without more violate the defendant's constitutional rights (see *United States* v. *Bryant*, 439 F.2d 642, 653 (D.C. Cir. 1971)), the necessary predicate for such a rule is wholly absent here, where the government is making a good faith, case-by-case effort to deal with a very difficult problem.

> Appellant concedes that he is unable to show that the witnesses in question would have offered testimony favorable to the defense. Such statement is understandable in view of the fact that appellant was, by Government action, deprived of the opportunity to interview said witnesses. Appellant couldn't know what these witnesses might say, if anything. We are in the same position as the appellant. We decline to indulge in any speculation that the interviews would, or would not, have been fruitful to the defense.

See also Pet. App. 4a-5a; *United States* v. *Calzada*, *supra*, 579 F.2d at 1362.

Although this reasoning has a superficial appeal, careful scrutiny discloses one logical flaw and one factual inaccuracy that make the statement completely unpersuasive as a basis for abandoning the traditional rule requiring a showing of materiality. First, it is completely irrelevant whether the defendant can show what the missing aliens actually "would" say. None of the cases imposing materiality requirements for claims relating to unavailable evidence require a defendant to show precisely what the evidence is. What is required—and should be feasible—is that the defendant suggest concretely and plausibly what the witness "could" say that would be material to his defense.

Second, it is ridiculous in most cases to conclude that the defendant cannot know what the witness could say on his behalf. The defense in this case is not mistaken identity. Respondent was the person who transported the aliens. He thus knows full well what he told the aliens and what they told him. As the Fifth Circuit recognized in rejecting the Ninth and Seventh Circuit's approach in these cases: "It is important to remember that the defendants pre-

sumably know the truth in this case." *United States* v. *Avila-Dominguez*, *supra*, 610 F.2d at 1270. Thus, it is not unreasonable to require the defendant, either personally or at least through counsel, to explain specifically what these aliens might have testified to that could have favorably affected his case.

In addition, no court that has relied upon this argument has explained why the defendant's situation in these cases is significantly different from that of the defendants in the *Roviaro* situation. Generally, defendants in those cases do not even know the identity of the missing witness, much less what he would testify about. Yet, neither the Court in *Roviaro* nor the courts subsequently interpreting that decision (see pages 24-25, *supra*) have excused defendants from the obligation to make a substantial showing of what the confidential informant could say that would be material to the defendant's case. The departure by the Ninth and Seventh Circuits from the normal requirements of a compulsory process claim therefore simply is not justifiable on this ground.

We think the appropriate approach to the element of materiality or prejudice in these cases is to require the defendant to make some concrete showing of what he believes the missing witnesses could have testified to that would have benefitted him. This proffer should be analyzed by comparing it to the statements the aliens made to the officials at the time of their arrest and the other facts surrounding the case to assure that the claim is not simply incredible. See, *e.g.*, *United States* v. *Hegwood*, 562 F.2d 946, 953 (5th Cir. 1977), cert. denied, 434 U.S. 1079 (1978); *United States* v. *Coppola*, 479 F.2d 1153, 1164 (10th Cir. 1973); *Welsh* v. *United States*, 404

F.2d 414, 417 (5th Cir. 1968). If the defendant has made a concrete and credible showing, it would next become necessary to assess the materiality of the missing "evidence" in light of the entire case. While the showing of materiality that should be required may depend on a number of variables (see *United States* v. *Agurs*, *supra*), surely the defendant is entitled to no more generous standard than that employed in the case of a prosecutor's knowing or culpable use of perjured testimony, *viz.*, that the missing testimony " 'could * * * in any reasonable likelihood have affected the [trier of fact].' " *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959).[15]

Applying even this generous standard to respondent's case, he is plainly entitled to no relief. Respondent has claimed that the missing witnesses could testify that they never told him that they were illegal aliens, and that this bears on whether the statutory requirement of knowledge was satisfied. The proffered testimony is not facially implausible. There may well have been no conversation regarding the status of the aliens. Thus, the issue is whether this testimony, in light of all of the evidence, could reasonably have had any effect on the judge's determination of guilt in this case. Given respondent's admission at the time of his arrest, the circumstances of the arrest as testified to by the agents, the evidence

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[15] Generally, the missing witness issue is raised prior to trial, but it may be difficult to determine materiality at that time. Unless the proffered testimony is either plainly irrelevant or manifestly exculpatory, the proper approach usually will be to decide the issue after trial, so that the significance of the missing evidence can be assessed in light of all of the available evidence.

of Romero-Morales, and the cumulative nature of the missing aliens' testimony, there is no question that the respondent's rights, properly understood, were not violated by the unavailability of the witnesses at trial.

II. EVEN IF RESPONDENT'S RIGHTS WERE VIOLATED BY THE DEPORTATION OF THESE WITNESSES, DISMISSAL OF HIS INDICTMENT IS AN INAPPROPRIATE REMEDY

We assume for the remainder of this brief that, contrary to the argument elaborated above, the deportation of the two illegal aliens did violate respondent's constitutional rights. Indeed, we now assume for the sake of argument that the court of appeals was correct in its apparent holding (Pet. App. 7a) that the Constitution is violated whenever a witness is deported who could "conceivably benefit" a criminal defendant's case. Having made this assumption, however, we continue to submit that the court of appeals' disposition of this case was wrong. That is because a significant question regarding the appropriate remedy remains to be resolved once a court has found that a constitutional violation has occurred. Here, the court of appeals applied the extreme sanction of dismissal of a criminal indictment with prejudice, even though respondent has not shown any real likelihood of prejudice caused by the loss of these witnesses. By awarding relief so thoroughly disproportionate to the actual harm incurred by respondent, the court of appeals erred.

Under the Ninth Circuit's decision in this case, not only must the government assume the burden of detaining large numbers of aliens and thereby cause them a significant deprivation, but also it must allow

the guilty to go free in complete disregard of the public's interest. This is much too high a price to pay to guarantee the defendant only a "conceivable benefit." Certainly, before dismissal of an indictment is required, respondent must at a minimum show some tangible indication of prejudice to his case that cannot be remedied by less drastic measures.

Just this past term in *United States* v. *Morrison*, 449 U.S. 361, 364 (1981), a case involving the right to counsel, this Court indicated that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." Consistent with this principle, the Court held that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *United States* v. *Morrison*, *supra*, 449 U.S. at 365. See also *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977); *United States* v. *Marion*, 404 U.S. 307, 324-325 (1971). In outlining the proper approach to be taken in fashioning a remedy, the Court stated that its analysis has been "to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure * * * a fair trial." *United States* v. *Morrison*, *supra*, 449 U.S. at 365. Thus, the critical consideration in choosing a remedy for a Sixth Amendment violation (or a due process violation) is to guarantee the fairness of the criminal proceedings against the defendant. Accordingly, the remedy should be no broader than is absolutely necessary to ensure that the defendant is not deprived of truly material evidence relating to the issue of guilt.

Similarly, in the Fifth Amendment context, the Court has expressly ruled that dismissal of an indictment is too drastic a remedy for the acquisition of evidence in violation of the privilege against compulsory self-incrimination. See *United States* v. *Blue*, 384 U.S. 251, 255 (1966), where this Court stated:

> Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.

Because there is no evidence to suppress in this case, respondent suggests that dismissal of the indictment is the only relief available to redress the violation of his rights (Br. in Opp. 8-9). This argument, which was rejected in principle in *Morrison*, is also defective in practice in this case because it overlooks a variety of options available to a court. For instance, in this case the government offered to stipulate that neither of the absent aliens ever told respondent that they were illegally present in the United States. Neither the court of appeals nor the respondent has indicated why that offer would not have been an adequate remedy in this case. If anything, the use of such a stipulation would have given respondent the advantage of having the government concede to the truthfulness of the only relevant fact that could have been (but in fact might not have been) testified to by the missing witnesses had they been available. Unlike

the situation where the defendant relies upon actual witnesses who can be cross-examined and impeached, this use of the stipulation eliminates the credibility issue in a way that is distinctly favorable to the accused. Accordingly, the use of the stipulation would have more than adequately protected respondent's rights.[16]

Moreover, in a case involving the transportation or harboring of aliens where the defendant has failed to demonstrate that he has suffered any real prejudice, any technical violation of his rights can usually be neutralized effectively by requiring the government to forgo prosecution on any charges that would involve the unavailable witnesses. Certainly, that was the view of the district court in this case (Pet. App. 12a). Here the government did not indict respondent for transporting the two illegal aliens it had returned to Mexico. He was prosecuted for transporting only the one remaining illegal alien. By following this course, the most crucial witness to the charged offense, Romero-Morales, was still available to the respondent.

The only testimony we can think of that the unavailable witnesses could have offered relevant to the charge of unlawful transportation of Romero-Morales would be that they never heard Romero-Morales inform respondent that he was in the country illegally.

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[16] Obviously, whether an adequate stipulation can be formulated in a given situation must be decided on a case-by-case basis. It is easy to devise solutions when the injury affects only "conceivable" benefits, but it might be more difficult when some more substantial likelihood of prejudice exists. The experience in the Fifth Circuit, however, suggests that such situations do not arise frequently.

This testimony would have been cumulative of Romero-Morales' own statement, and its absence from the trial in no way deprived respondent of his right to present a defense.[17] Thus, any real injury to respondent's rights in this case was remedied at the time of the indictment.

Respondent has never demonstrated how he was prejudiced by the release of the illegal aliens or how either of them could have benefitted his defense. In fact, during the course of the proceedings in the district court, respondent and defense counsel conceded that he was guilty and that he had no defense (J.A. 58). Thus, the evidence of guilt was overwhelming and respondent suffered no discernible injury by the government's action in this case. Accordingly, regardless of what other remedy might have been appropriate, under *United States* v. *Morrison*, *supra*, dismissal of this criminal prosecution was wholly improper.

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[17] The issue presented by this case is not unlike the situation in which a witness peculiarly within the control of one party is not produced to testify at trial. This is dealt with by allowing the finder of fact to draw an adverse inference against the non-producing party. See generally I E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 17.19 (1977). The courts of appeals that have ordered dismissals of indictments have never explained why this less drastic approach would not ordinarily be adequate to rectify the problems created by the good faith deportation of illegal aliens who are not known to the government to possess material exculpatory evidence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

CARTER G. PHILLIPS
Assistant to the Solicitor General

CAROLYN L. GAINES
Attorney

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Respondent's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

Petitioner,

v.

RICARDO VALENZUELA-BERNAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE RESPONDENT

JOHN J. CLEARY
EUGENE G. IREDALE
CRAIG E. WEINERMAN
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101-5070
(714) 234-8467
FTS 895-5240

Counsel for Respondent

CLB PUBLISHERS & LITHOGRAPHERS, INC. • (301) 933-5220

QUESTIONS PRESENTED

1. Whether the deliberate deportation by the government of two eyewitnesses to the offense for which the defendant was prosecuted deprived the defendant of his Sixth Amendment right to have compulsory process for obtaining witnesses in his favor and his Fifth Amendment right to due process?

2. Whether dismissal of the indictment is the appropriate sanction when the defendant demonstrates the deported witnesses were eyewitnesses to and participants in the events constituting the alleged offense who might have provided testimony that was material to the defense?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

JUDGMENT BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

The Nature of the Case 2

Apprehension of Valenzuela and the Witnesses 2

Unilateral Release of the Witnesses by the Government 4

Procedure for Handling Material Witnesses in the Southern District of California 6

Respondent's Showing of Materiality at the District Court 9

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. THE DEPORTATION BY THE GOVERNMENT OF TWO EYEWITNESSES TO THE OFFENSE FOR WHICH THE DEFENDANT WAS PROSECUTED DEPRIVED THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR AND HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS 13

The Compulsory Process Clause of the Sixth Amendment 14

The Due Process Clause 19

The *Mendez-Rodriguez* Doctrine 20

Practice in the Southern District of California..... 28

Elements of 8 U.S.C. §1324 30

Deportation of the Two Material Witnesses by the Government Constituted a Violation of Compulsory Process and Due Process..... 34

In an Adversary System of Criminal Justice Border Patrol Agents and Prosecutors are Ill-equipped to Decide for the Defense who the Witnesses Should Be 37

The Deliberate Deportation of the Material Witnesses Violated the Defendant's Constitutional Rights Regardless of the Good or Bad Faith of the Prosecution..... 41

The Defendant is Entitled to Relief upon a Showing that the Witnesses Deported by the Government were Eyewitnesses to or Participants in the Alleged Offense Whose Testimony Might Have Been Material to the Case 44

II. A. DISMISSAL IS THE ONLY APPROPRIATE SANCTION FOR THE CONSTITUTIONAL DEPRIVATION IN THIS CASE..... 53

B. THE GOVERNMENT USURPATION OF THE ROLE OF DEFENSE COUNSEL REQUIRES DISMISSAL 58

CONCLUSION 59

TABLE OF AUTHORITIES

Cases *Page*

Alderman v. United States,
394 U.S. 165 (1969).....12, 37, 39

Barber v. Page,
390 U.S. 719 (1968)..... 36

Berger v. United States,
295 U.S. 78 (1935) 41

Blackmer v. United States,
284 U.S. 421 (1932) 18

Bland v. United States,
299 F.2d 105 (5th Cir. 1962) 31

Bolling v. Sharpe,
347 U.S. 497 (1954) 20

Brady v. Maryland,
373 U.S. 83 (1963) 57

Bray v. Peyton,
429 F.2d 500 (4th Cir. 1970) 35

Chambers v. Mississippi,
410 U.S. 284 (1973) 19, 20, 43, 58

Cool v. United States,
409 U.S. 100 (1972) 19

Davis v. Alaska,
415 U.S. 308 (1974) 55, 58

Dennis v. United States,
384 U.S. 855 (1966) 12, 37, 39

Dunaway v. New York,
442 U.S. 200 (1979) 27

Ex parte Harding,
126 U.S. 782 (1887) 18

Freeman v. State of Georgia,
599 F.2d 65 (5th Cir. 1979) 35

Giglio v. United States,
405 U.S. 150 (1972) 50

Gregory v. United States,
369 F.2d 185 (D.C. Cir. 1966) 21, 35, 37

In re Oliver,
333 U.S. 257 (1948) 20

Jencks v. United States,
353 U.S. 657 (1957) 54

Lockett v. Blackburn,
571 F.2d 309 (5th Cir. 1978) 35

Motes v. United States,
178 U.S. 458 (1900) 36

Napue v. Illinois,
360 U.S. 264 (1959) 50

New York v. Belton,
453 U.S. ____ , 101 S.Ct. 2860 (1981) 27

Olmstead v. United States,
277 U.S. 438 (1928) 51

Pate v. Robinson,
383 U.S. 375 (1966) 18

Pointer v. Texas,
380 U.S. 400 (1965) 36

Polk County v. Dodson,
____ U.S. ____ , 102 S.Ct. 445 (1981) 59

Powell v. Alabama,
287 U.S. 45 (1932) 58

Rosales-Lopez v. United States,
451 U.S. ____ , 101 S.Ct. 1629 (1981) 31

Rosen v. United States,
245 U.S. 467 (1918) 18

Roviaro v. United States,
353 U.S. 53 (1957) 12, 13, 47, 48, 54

St. Louis Baptist Temple, Inc., v. FDIC,
605 F.2d 1169 (10th Cir. 1979) 30

Singleton v. Lefkowitz,
583 F.2d 618 (2d Cir. 1978) 35, 43

Steagald v. United States,
____ U.S. ____ , 101 S.Ct. 1642 (1981) 42

United States v. Andolschek,
142 F.2d 503 (2d Cir. 1944) 54

United States v. Ash,
413 U.S. 300 (1973) 40

United States v. Avila-Dominguez,
610 F.2d 1266 (5th Cir. 1980) 11, 13, 34, 46

United States v. Ayala,
643 F.2d 244 (5th Cir. 1981) 49

United States v. Beekman,
155 F.2d 580 (2d Cir. 1946) 54

United States v. Bryant,
439 F.2d 642 (D.C. Cir. 1971) 27, 43, 51

United States v. Burr,
25 F.Cas. 30 (C.C.D.Va.1807) (No.14,692d) 12,17,18,46

United States v. Burr,
25 F.Cas. 187 (C.C.D.Va. 1807) (No. 14,694) 45, 56

United States v. Calzada,
579 F.2d 1358 (7th Cir. 1978) 11, 34

United States v. Carrillo-Frausto,
500 F.2d 234 (9th Cir. 1974) 26

United States v. Castellanos-Machorro,
512 F.2d 1181 (9th Cir. 1975) 25

United States v. Castillo,
615 F.2d 878 (9th Cir. 1980) 11, 23, 24

United States v. Gonzalez,
617 F.2d 1358 (9th Cir. 1980) 24

United States v. Gonzalez-Hernandez,
534 F.2d 1353 (9th Cir. 1976) 31

United States v. Henao,
652 F.2d 591 (5th Cir. 1981) 46

United States v. Hernandez-Gonzalez,
608 F.2d 1240 (9th Cir. 1979) 26

United States v. Holley,
493 F.2d 581 (9th Cir. 1974) 31

United States v. Jacobo-Gil,
474 F.2d 1213 (9th Cir. 1973) 31

United States v. Jones,
476 F.2d 885 (D.C. Cir. 1973) 35

United States v. King,
552 F.2d 833 (9th Cir. 1976) 29

United States v. Lomeli-Garnica,
495 F.2d 313 (9th Cir. 1974) 25

United States v. Lovasco,
431 U.S. 783 (1977) 53

United States v. Lujan-Castro,
602 F.2d 877 (9th Cir. 1979) 8, 26

United States v. Marion,
404 U.S. 307 (1971) 53

United States v. Martinez-Morales,
632 F.2d 112 (9th Cir. 1980) 24

United States v. McQuillan,
507 F.2d 30 (9th Cir. 1974) 23, 25

United States v. Mendez-Rodriguez,
450 F.2d 1 (9th Cir. 1971) ..... *passim*

United States v. Moreno,
561 F.2d 1321 (9th Cir. 1977) 31

United States v. Morrison,
449 U.S. 361 (1981) 53

United States v. Morrison,
535 F.2d 223 (3d Cir. 1976) 35

United States v. Nixon,
418 U.S. 683 (1974) ..... *passim*

United States v. Nobles,
422 U.S. 225 (1975) 41

United States v. Opager,
589 F.2d 799 (5th Cir. 1979) 35

United States v. Orozco-Rico,
589 F.2d 433 (9th Cir. 1978) 23, 25

United States v. Pollard,
479 F.2d 310 (8th Cir. 1973) 35

United States v. Reid,
53 U.S. (12 How.) 361 (1851) 18

United States v. Reynolds,
345 U.S. 1 (1953) 13, 54

United States v. Romero,
469 F.2d 1078 (9th Cir. 1972) 25

United States v. Sanchez-Murillo,
608 F.2d 1314 (9th Cir. 1979) 25

United States v. Smith,
478 F.2d 976 (D.C. Cir. 1973) 35

United States v. Tariq,
521 F.Supp. 773 (D.Md. 1981) 23

United States v. Tsutagawa,
500 F.2d 420 (9th Cir. 1974) 7, 11, 25, 37

United States v. Valenzuela-Bernal,
647 F.2d 72 (9th Cir. 1981) 12, 26, 39, 46

United States v. Van Duzee,
140 U.S. 169 (1891) 18

United States v. Verduzco-Macias,
463 F.2d 105 (9th Cir. 1972) 26

Wardius v. Oregon,
412 U.S. 470 (1973) 19, 41

Washington v. Texas,
388 U.S. 14 (1967) ..... *passim*

Webb v. Texas,
409 U.S. 95 (1972) 19, 20, 36

Williams v. Florida,
399 U.S. 78 (1970) 40, 41

Constitutional Provisions:

United States Constitution

Amendment V 19, 20

Amendment VI 14, 58

Amendment XIV 14

Statutes:

8 C.F.R. §212.5 (1980) 7

8 C.F.R. §299.1 56

8 U.S.C. §1324 ..... 10, 20, 30

8 U.S.C. §1325 ..... 6, 38, 50
8 U.S.C. §1326 6
18 U.S.C. §2 50
18 U.S.C. §3006A (Criminal Justice Act) 6
18 U.S.C. §3146 6
18 U.S.C. §3149 ..... 2, 6, 7, 29
18 U.S.C. §§3161, *et seq.* (Speedy Trial Act) 29

Rules:

Federal Rules of Criminal Procedure
Rule 10 7
Rule 15 ..... 8, 11, 29

Federal Rules of Evidence
Rule 201(b) 30
Rule 804 8

Texts:

C. Beard, *The Supreme Court and the Constitution,* 113 (1912) 17

Byrne, II *Of Crimes and Punishments* (1795-1796) 58

Way, *Criminal Justice and the American Constitution,* 406 (Duxbury Press, 1980 ed.) 16

Articles:

Westen, *Compulsory Process II,* 74 Mich.L.Rev. 191 (1975) 14, 46, 57

Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv.L.Rev. 567 (1977-1978) 14, 36, 43

Westen, *The Compulsory Process Clause,* 73 Mich.L.Rev. 71 (1974) ..... *passim*

Westen, *The Future of Confrontation,* 77 Mich.L.Rev. 1185 (1979) 36

Miscellaneous:

American Bar Association Standards for Criminal Justice: 42, 58
The Prosecution Function, Standard 3-3.1(c) (1980) ... 42
The Defense Function, Standard 4-4.1 (1979) 58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-450

UNITED STATES OF AMERICA,

Petitioner,

v.

RICARDO VALENZUELA-BERNAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE RESPONDENT

JUDGMENT BELOW

On 12 August 1980, the respondent was sentenced to a term of imprisonment for five years, execution of all but 179 days of which was suspended and he was placed on probation for a period of five years [R.T. 70; J.A. 61-62].[1]

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[1] "R.T." refers to the page in the Reporter's Transcript. "J.A." refers to the Joint Appendix in this Court.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 18, U.S.C. §3149 provides:

> If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

The Nature of the Case

The respondent, Ricardo Valenzuela-Bernal (hereinafter referred to as Valenzuela or the defendant) was charged and convicted of illegal transportation of an alien in violation of 8 U.S.C. §1324(a) (2).

Apprehension of Valenzuela and the Witnesses

Valenzuela, a citizen of the Republic of Mexico, entered the United States without inspection on 23 March 1980

[J.A. 25]. After entry, Valenzuela was taken to a house in Escondido, California, where he remained for six days [J.A. 25]. Valenzuela was being charged $200 to be taken to Los Angeles [J.A. 26]. Apparently, Valenzuela was not permitted to leave the house until permitted by the smuggler [R.T. 63; J.A. 57].

On 29 March 1980, six days after Valenzuela's arrival, a group of four persons arrived at the house in Escondido, California [R.T. 12, 18; J.A. 26, 37, 41]. One of these persons, Enrique Romero-Morales (hereinafter referred to as Romero), had entered the United States illegally with three other persons on 28 March 1980 [R.T. 12; J.A. 26, 37]. Valenzuela was not one of these three persons [R.T. 12; J.A. 37]. Romero did not converse with Valenzuela while at the house in Escondido [R.T. 13-14, 23; J.A. 38, 44].

On 29 March 1980, Valenzuela, Romero, one of the persons who entered the United States illegally with Romero, and three other persons left the house by car *en route* to Los Angeles [R.T. 18-20; J.A. 41-42]. As the car approached Temecula, California, Valenzuela and his passengers encountered the manned Border Patrol checkpoint [R.T. 23, 32-34; J.A. 45-46]. Valenzuela said that "they are checking" and the passengers slouched down in their seats [R.T. 20, 23; J.A. 42, 45]. Valenzuela rolled the vehicle through the checkpoint and accelerated to a high rate of speed [R.T. 36, 42; J.A. 49, 53]. Border Patrol agents pursued Valenzuela on Interstate 15 until Valenzuela stopped the vehicle [R.T. 44; J.A. 27, 54]. He and the other occupants scrambled out of the vehicle and ran in different directions [R.T. 44; J.A. 27, 54]. Valenzuela was apprehended and beaten up by a citizen [R.T. 44-45, 66-67; J.A. 54, 59]. Romero and two other passengers were arrested by Border Patrol agents [R.T. 45; J.A. 54].

After his arrest, Valenzuela waived his right to remain silent and to consult with an attorney and made a statement to a Border Patrol agent [J.A. 24-29]. When asked why he did not stop at the checkpoint, Valenzuela stated:

> Well, I did stop but since I was bringing the people, I already knew that I had had it. Too late. It was done.

[J.A. 27]

Unilateral Release of the Witnesses by the Government

Shortly after the arrest of Valenzuela, Assistant United States Attorney David Doyle was contacted by an investigator from the Border Patrol's Anti-Smuggling Unit. Doyle was seeking a test case to change the method by which material witnesses were handled in the Southern District of California. He believed the Ninth Circuit Court of Appeals had significantly limited the scope of *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971), and he was seeking to release witnesses after an arrest without giving defense counsel an opportunity to interview them. Doyle had previously told the head of the Border Patrol Anti-Smuggling Unit that he was looking for a case where it would be appropriate to release material witnesses and in which there could be no possibility of prejudice to a defendant. Doyle was told by the criminal investigator that Valenzuela's case was the type of case where they might wish to release the witnesses [Supp.R.T. 34-38; J.A. 63-65].[2]

The criminal investigator advised Doyle that there had been a complete confession by Valenzuela, that he had admitted that he was the driver of the automobile, that he was

[2] "Supp.R.T." refers to the Supplemental Reporter's Transcript of the proceedings.

driving for a free ride, and that there were illegal aliens in the vehicle. Doyle was told that agents had observed persons lying down in the back of the vehicle as it passed the checkpoint, that there had been a high-speed chase, and that Valenzuela had fled the vehicle on foot. The investigator told Doyle that there was no difference in the statements of the three witnesses [Supp.R.T. 7-9; J.A. 65-66].

Based upon the information provided during this 10- to 15-minute telephone conversation, the prosecutor directed the Border Patrol agent to release all but one of the three witnesses that had been apprehended [Supp.R.T. 8; J.A. 66]. This decision to release the witnesses was based on the determination of the prosecutor that the witnesses would be of no benefit to Valenzuela [Supp.R.T. 11-13; J.A. 68-69]. However, the real cornerstone of the prosecutor's decision to release the witnesses was his belief that Valenzuela had confessed to each and every element of the charge when he gave a statement to the Border Patrol investigator [Supp.R.T. 24; J.A. 77].

During the hearing on the motion to dismiss the indictment, Doyle admitted that his analysis of Valenzuela's statement was based on information provided by the Border Patrol investigator. A verbatim transcript of Valenzuela's statement was not available until weeks after the decision to release the other witnesses was made. The prosecutor admitted that the so-called "confession" did not state that Valenzuela knew the passengers were illegal aliens who had entered the United States within the last three years and that he was transporting them in furtherance of their violation of law [Supp.R.T. 9, 25-28; J.A. 67, 78-80].

Procedure for Handling Material Witnesses in the Southern District of California

Upon the arrest of a defendant for illegal transportation of aliens, a complaint is filed alleging that the persons being transported by the defendant are material witnesses to the offense.[3] A United States magistrate addresses the witnesses, appoints an attorney to represent them,[4] and generally orders them held in custody pending presentment of the defendant's case to a federal grand jury.[5] Approxi-

[3]In its brief the government notes that large numbers of persons are held pursuant to the *Mendez-Rodriguez* doctrine [Government Brief (hereinafter G.B.) at 19-20]. How many of these witnesses are held, at the Government's request to be used at trial, is not indicated. At issue in this case is not the question of whether material witnesses from Mexico will be detained, but rather, whether the government will be allowed to pick and choose which witnesses are held.

[4]Almost every material witness is impecunious and entitled to the appointment of counsel under the Criminal Justice Act (18 U.S.C. §3006A). This attorney seeks creative approaches to gain pretrial release or pressures the court for an early disposition. The attorney for the material witness secures from the prosecutor informal immunity for the witness from prosecution for illegal entry (8 U.S.C. § 1325) in return for their testimony against the defendant.

These "witnesses" have presumptively committed illegal entry (8 U.S.C. § 1325), and if prosecuted, could be sentenced to a term of up to six months in custody. If they had a prior conviction for illegal entry (8 U.S.C. §1325) or were previously deported (8 U.S.C. §1326) they would face up to two years imprisonment. In a sense, they are "singing for their supper."

[5]Pursuant to 18 U.S.C. §§3146 and 3149, any person detained as a material witness is entitled to be admitted to bail. Under the liberal bail policies initiated by the magistrates of the Southern District of California, any material witness who can show that he has a citizen or legal resident alien relative or friend with whom he can stay pending the outcome of the prosecution, will generally be admitted to bail under a personal surety bond.

mately five to ten days later, at the defendant's arraignment under Rule 10, Federal Rules of Criminal Procedure, the United States magistrate holds a material witness bail review pursuant to 18 U.S.C. §3149. During the five- to ten-day period between the arrest of the defendant and his arraignment on the indictment, the defendant's attorney after giving notice to the material witness attorney[6] is expected to interview the material witnesses to determine whether they can provide testimony material to the defendant's case. At the materiality hearing before the United States magistrate, both the government and the defendant must make a showing that the detained witnesses are material to his case or else the witnesses are ordered released by the magistrate. This traditional method of dealing with the detention of material witnesses was rejected by the prosecutor in this case [Supp. R.T. 15, 19-21; J.A. 71, 74-75].

During his testimony at the motion hearing, the prosecutor discussed alternatives to the outright release of material witnesses. He rejected the alternative of giving the witnesses parole letters[7] and having them returned to the United States at a later time. This alternative to incarceration of the witnesses was described as being "simply not worth the effort" [Supp.R.T. 12-13; J.A. 69-70]. During his testimony, the prosecutor discussed the alternative of housing the witnesses at work farms pending the ultimate disposition of the case. This was suggested as an alternative to incarceration in *United States v. Tsutagawa.*[8] Doyle testified that the government has discontinued this method of

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[6]In some cases, defense counsel is not permitted to speak with material witnesses. Some witnesses have used false names or made false statements or are more deeply involved in the criminal venture and do not wish to be exposed by making any further statement prior to trial.

[7]8 C.F.C. §212.5 (1980).

[8]500 F.2d 420 (9th Cir. 1974).

holding material witnesses pending trial [R.T. 13-15; J.A. 70-71].

The prosecutor rejected the method available in this case of obtaining a waiver by Valenzuela of his right to retain the witness.[9] At the time the prosecutor instructed the Border Patrol investigator to release the witnesses, the government had a form available for defendants personally to sign to release material witnesses on the same day as the arrest. This method of avoiding the incarceration of material witnesses had been employed in cases similar to that of Valenzuela. This method was rejected by the prosecutor as being "unnecessary" [Supp.R.T. 15-17; J.A. 71-72].

During his testimony at the motion hearing, the prosecutor briefly discussed other alternatives to outright release of percipient material witnesses. Rejected as alternatives in this case were depositions of the material witnesses,[10] pursuant to Rule 15, Federal Rules of Criminal Procedure, stipulations to the expected testimony of the witnesses, use of a special grand jury session to investigate alien transportation cases in a more expeditious fashion, and the use of

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[9]*See United States v. Lujan-Castro*, 602 F.2d 877 (9th Cir. 1979).

[10]The use of depositions to allow the release of material witnesses is an available practice in the Southern District of California. Upon the completion of the deposition, the witness can be returned to Mexico, and upon an adequate showing of unavailability should the witness fail to return to the United States for trial, either party can seek the admission of the deposition pursuant to Rule 804 of the Federal Rules of Evidence. Despite the posture of concern with the plight of the material witnesses expressed in the government brief [G.B. at 19-22], the United States Attorney's Office now opposes the taking of depositions of material witnesses as a matter of policy in nearly every criminal case in the Southern District of California.

preliminary examinations after arrest in lieu of grand jury proceedings[11] [Supp.R.T. 22, 29; J.A. 76, 80].

Respondent's Showing of Materiality at the District Court

Since the material witnesses were ordered released by the prosecutor before the defendant had an opportunity to interview them, it was impossible to articulate with precision what the witnesses would have said had they been retained. The defendant claimed prejudice in the motion to dismiss the indictment because the government deprived him of an opportunity to interview eyewitnesses to the offense and determine whether the testimony of the released witnesses would conflict with the testimony of the retained witnesses [J.A. 12]. During the hearing on the motion to dismiss the indictment, the defendant attempted to develop through the testimony of Enrique Romero-Morales that the defendant lacked knowledge that the material witnesses were illegal aliens who had entered the United States within the last three years [R.T. 13-14; J.A. 37-38]. Before Romero's testimony, counsel for the defendant informed the district court that Romero's testimony "may enlighten the Court as to what the other witnesses might have said" [R.T. 10; J.A. 35]. In argument before the district court on the motion to dismiss the indictment, counsel for the defendant reasoned that the released witnesses could have cast a reasonable doubt upon the government's case had they testified in a way that suggested that the defendant lacked knowl-

[11]The potential of preliminary hearings as a device to preserve the testimony of such witnesses has never been considered. In state criminal practice preliminary hearings are the rule; in federal courts they are the rare exception.

edge of the illegal status of the passengers in the vehicle [Supp. R.T. 37-38; J.A. 85-86]. The court of appeals recognized that the defendant asserted at the district court level the defense that the missing witnesses may have corroborated his contention that he was unaware of the status of the passengers as illegal aliens who had entered the United States illegally within the last three years [Pet.App. 7a].[12]

SUMMARY OF ARGUMENT

I.

In *United States v. Mendez-Rodriguez,* 450 F.2d 1 (9th Cir. 1971), the Court of Appeals for the Ninth Circuit held that deportation of material witnesses to events which gave rise to an alien transportation charge before defense counsel had an opportunity to interview these witnesses constituted a violation of both due process and compulsory process. *Mendez-Rodriguez* condemned the government practice of choosing some witnesses for retention and the selective deportation of others. The holding of the case was designed to prevent the unfairness of allowing the government to pick

[12]Given the large numbers of undocumented persons in the United States, it was highly plausible to argue that while Valenzuela knew or should have known that his passengers were undocumented, he may well have believed that they had resided within the United States for a lengthy period and were travelling to obtain work in another part of the agricultural area of California. Knowledge that they were illegal would not satisfy this essential element of alien smuggling of "knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three year prior thereto." 8 U.S.C. §1324(a)(2).

and choose witnesses unilaterally and to place some of them beyond the subpoena power. *United States v. Tsutagawa,* 500 F.2d 420, 423 (9th Cir. 1974). The *Mendez-Rodriguez* rule is designed to prevent interference with the opportunity to formulate a defense. *United States v. Castillo,* 615 F.2d 878, 882 (9th Cir. 1980).

The *Mendez-Rodriguez* doctrine is narrow in scope, regional in effect, and constitutes a fair and conscientious attempt to secure minimal due process for criminal defendants in alien transportation and harboring offenses. The decision gives clear guidance to the prosecution and law enforcement personnel handling such cases. *Mendez-Rodriguez* requires only that the witnesses be retained for a brief time to allow defense interview. If, after the interview, defense counsel cannot show the specific way in which the witness will assist the defense, the witness can be released. Every court of appeals considering this issue has concluded that unilateral deportation of eyewitnesses before defense interview violates the Sixth Amendment. *United States v. Mendez-Rodriguez,* 450 F.2d 1 (9th Cir. 1971); *United States v. Avila-Dominguez,* 610 F.2d 1266 (5th Cir. 1980); *United States v. Calzada,* 579 F.2d 1358 (7th Cir. 1978).

Practice in the district courts under the *Mendez-Rodriguez* decision is designed to minimize needless detention of witnesses. The use of the material witness bail reviews, deposition practice under Rule 15, Federal Rules of Criminal Procedure, and the materiality hearing have assured rapid release of all witnesses except those essential to either the government or the defense case. The vast number of witnesses are released after a short period of time in custody.

In an adversary system of criminal justice, prosecutors and Border Patrol agents cannot be delegated the task of

determining whether potential witnesses will provide exculpatory testimony on behalf of a defendant. *E.g., Alderman v. United States,* 394 U.S. 165, 180-85 (1969); *Dennis v. United States,* 384 U.S. 855, 874-75 (1966). This task of assessing the materiality of potential defense evidence belongs to the defense. In Valenzuela's case, the decision to release the witnesses was made by a prosecutor acting under erroneous information provided by a Border Patrol agent who conducted a cursory and unintelligent interview.

That the prosecutor may have acted in good faith in ordering the release of the witnesses is irrelevant in determining whether a violation of the Sixth Amendment occurred. The controlling fact is the effect the deportation of the witnesses has in depriving the defendant of his right to refute the government's case or present his own defense by independent witnesses.

When a *Mendez-Rodriguez* violation occurs, dismissal of the charge is appropriate upon a showing that the deported witness was an eyewitness to or participant in the events constituting the alleged offense whose testimony could conveivably have benefitted the defense. *See Roviaro v. United States,* 353 U.S. 53, 64 (1957); *United States v. Valenzuela-Bernal,* 647 F.2d 72 (9th Cir. 1981). To require a specific and precise showing of what a witness would have said when the government has prevented the defense from speaking with the witness, is to impose an impossible and unfair burden. *United States v. Burr,* 25 F.Cas. 187, 191 (C.C.D.Va. 1807) (No. 14,694). It is sufficient if the defendant shows the testimony of the witnesses may be material due to their status as eyewitnesses or participants in the events surrounding the alleged offense. Whether the language used is "might have," "conceivable

benefit," "plausible theory," or "some suggestion," relief should be accorded unless the government can show that in no way could the deported witness have assisted the defendant's case.

II.

When the government violates the Constitution by deporting witnesses beyond the subpoena power before any access by defense counsel, dismissal of the indictment is the only appropriate sanction. As in regard to finding such action to be violative of the Constitution, the courts of appeals are in accord that dismissal is the proper remedy in such a case. *United States v. Mendez-Rodriguez, supra; United States v. Calzada, supra; United States v. Avila-Dominguez, supra.* This Court's holdings in *Roviaro v. United States,* 353 U.S. 53 (1957), *United States v. Reynolds,* 345 U.S. 1 (1953), and *United States v. Nixon,* 418 U.S. 683 (1974), require dismissal in this case, because it is unconscionable to allow the government to undertake prosecution of the accused and then deprive the defendant of evidence which might be material to his defense.

The prosecutor's removal of the witnesses usurped the constitutional duty of the defense counsel to properly investigate the case.

ARGUMENT

I.

THE DEPORTATION BY THE GOVERNMENT OF TWO EYEWITNESSES TO THE OFFENSE FOR WHICH THE DE-

FENDANT WAS PROSECUTED DEPRIVED THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR AND HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS.

The Compulsory Process Clause of the Sixth Amendment

The Compulsory Process Clause of the Sixth Amendment is the companion clause and "mirror image"[13] of the Confrontation Clause of the Constitution.

In a federal criminal case, the defendant is entitled "to have compulsory process for obtaining witnesses in his favor . . . ." *United States Constitution,* Amendment VI. Compulsory process is so essential to a fair trial that this Court has deemed it applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Washington v. Texas,* 388 U.S. 14, 19 (1967). Compulsory process embodies not only the right to subpoena potential defense witnesses but the right to call witnesses at trial and place their testimony before the trier of fact. *Id.* at 19. Compulsory process, however, is more than a trial right. It is the right of the defendant to investigate, prepare, and present his case without interference by the government.[14]

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[13]Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv.L.Rev. 567, 569 (1977-1978).

[14]Professor Peter Westen, in one of his comprehensive articles on compulsory process, states that rights under compulsory process attach when the defendant first has an interest in preparing his defense (perhaps at time of arrest) and continues through to the actual presentation of defense witnesses to the trier of fact. Westen, *The Compulsory Process Clause*, 73 Mich.L.Rev. 71, 99-115 (1974) (hereinafter cited as *Compulsory Process I*). *See also* Westen, *Compulsory Process II*, 74 Mich.L.Rev. 191 (1975).

The constitutional meaning of compulsory process is engrained in the history of English and American criminal procedure.[15] In England, the history of compulsory process tracked the general development of British jurisprudence from an inquisitorial to an adversarial system of trial procedure. Criminal cases in the late medieval period were tried by jurors who knew the parties, and presumably, the facts of the case, and consequently had no need to hear testimony from witnesses. Later, as the jury system evolved to allow the trier of fact to consider the testimony of sworn prosecution witnesses, the defense was precluded from admitting sworn testimony from the defendant or his witnesses. It was during the 18th Century that the defendant finally received an equal opportunity with the prosecution to present a defense through witnesses.[16]

The rationale for the exclusion of sworn testimony by defense witnesses before 1600 was curiously akin to certain arguments in the government brief in this case. Professor Westen summarizes these early arguments as follows: "[T]he defendant had no need for sworn witnesses, because the prosecution had a duty to present a case so compelling that no witnesses could refute it; and that the defendant could rely on the mercy of the court to safeguard his interests." Westen, *Compulsory Process I, supra* at 86 (footnotes omitted). Coke, Hale, and Jeffries all suggested that these arguments were without merit.[17] A reform commission appointed by Parliament headed by Matthew Hale recommended that defense witnesses be permitted to testify under oath in all criminal cases.[18]

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[15]An excellent review of the English common law and early American history in this area can be found at Westen, *Compulsory Process I, supra* at 75-99.

[16]Westen, *Compulsory Process I, supra* at 78.

[17]*Id.* at 86.

[18]*Id.* at 88.

During colonial times, the right of the defendant to present evidence through the sworn testimony of witnesses and to have compulsory process of those witnesses was recognized by many of the American colonies.[19] Following the American Revolution, a number of these colonies included the right to compulsory process in their state constitutions.[20] Thus, even before the ratification of the Bill of Rights, it was generally accepted that a defendant should have meaningful opportunity, at least equal to that possessed by the prosecution, to prepare and present a defense.[21]

James Madison drafted the Sixth Amendment of which the Compulsory Process Clause is a part.[22] Although the wording of the Compulsory Process Clause is narrow, Madison did not intend to confine this principle to merely the right to subpoena witnesses; it was intended that it encompass the right to present a defense.[23]

It was shortly after the adoption of James Madison's formulation of the Compulsory Process Clause into the Bill of Rights that Chief Justice John Marshall, presiding as a Circuit Judge, gave a contemporary construction to the Compulsory Process Clause in the treason and misdemeanor trials of Aaron Burr. Marshall's decision in the *Burr* case remarkably prefigured this Court's holding in *United States v. Nixon,* 418 U.S. 683 (1974). His two opinions in the case are particularly significant because they embody the initial judicial construction of the Compulsory

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[19]Way, *Criminal Justice and the American Constitution,* 406 (Duxbury Press, 1980 ed.).

[20]Westen, *Compulsory Process I, supra* at 91.

[21]*Id.* at 95-99; Way, *supra* at 406.

[22]Way, *supra* at 406.

[23]Westen, *Compulsory Process I, supra* at 97-101.

Process Clause by the leading constitutional jurist of early American history.[24] Marshall wrote of the Compulsory Process Clause: "[T]he right given by this article must be deemed sacred by courts and the article should be so construed as to be something more than a dead letter." *United States v. Burr*, 25 F.Cas. 30, 33 (C.C.D.Va. 1807) (No. 14,692d). Chief Justice Marshall rejected the notion that the Sixth Amendment granted trial rights which did not take effect until the return of a grand jury indictment. *Id.* at 33. He understood compulsory process to enable the accused to prepare and present his defense. *Id.* at 33.

In response to Burr's subpoena for the famous letters from General Wilkinson to President Jefferson, the government raised several objections. One objection that is particularly apposite to this case[25] concerns the government's motion to quash the subpoenas because, instead of showing precisely how he would use the Wilkinson letters, Burr simply alleged that the letters "[m]ay be material in his defence." *Id.* at 31. Marshall, responding to the argument, held that he considered Burr's showing sufficient so long as "there exist[s] any reason for supposing that the [subpoenaed] testimony may be material . . . ." *Id.* at 38. A requirement that Burr make a specific showing of materiality, before he knows what the letters contain and "before he knows positively what the witness will say" at trial, Marshall held, would be

[24]The opinions of judges who were contemporaries of the framers of the Constitution are entitled to great weight in construing the intentions of the framers. C. Beard, *The Supreme Court and the Constitution*, 113 (1912).

[25]The government argues that in order for relief to be granted, the defense must make a "concrete and substantial showing that the witness might have offered material exculpatory evidence" [G.B. at 24]. Given that the government's action prevents the defense from speaking with the witness, this seems a harsh standard to impose.

unreasonable. *Id.* at 36. In his second opinion in the *Burr* case, Marshall returned to the same issue: "Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?" *United States v. Burr,* 25 F.Cas. 187, 191 (C.C.D.Va. 1807) (No. 14,694). Chief Justice Marshall rejected the government's argument, similar to that made in this case, that the party having no access to a witness must make a specific showing as to what the witness will say in order to obtain judicial relief.

The second *Burr* opinion dealt with the claim of executive privilege by the President to withhold the document subpoenaed. Chief Justice Marshall made clear that if the President refused to disclose the information, the courts would have no choice but to halt the prosecution. He referred to the civil practice of ordering a non-suit against a plaintiff who fails to produce material evidence. *Id.* at 191-92. Professor Westen notes that the *Burr* case had seminal and critical importance and, before this Court's decision in *Washington v. Texas,* represented the most important case construing the Compulsory Process Clause.[26] In *Washington v. Texas, supra,* this Court confirmed that compulsory process meant more than the right to subpoena witnesses,

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[26]Between the decision in *Burr* and this Court's holding in *Washington v. Texas*, the Court mentioned compulsory process only five times, twice in dictum and three times finding it irrelevant to the result. Westen *Compulsory Process I, supra* at 106. *See Pate v. Robinson*, 383 U.S. 375, 378 n.1 (1966); *Blackmer v. United*, 284 U.S. 421, 442 (1932); *United States v. Van Duzee*, 140 U.S. 169, 173 (1891) (dictum re: government expense not required for issuance of defense subpoenas); *Ex parte Harding*, 126 U.S. 782 (1887); *United States v. Reid*, 53 U.S. (12 How.) 361, 363-65 (1851) (dictum), overruled in *Rosen v. United States*, 245 U.S. 467 (1918).

and included the right to call them and have them heard at trial. The oft-quoted language of the Court's decision emphasizes that the Compulsory Process Clause is an integral part of our adversary system of justice:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 19.

The Court in *Washington v. Texas* found that the compulsory process rights of the defendant had been denied "because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Id.* at 23. As this Court made clear in subsequent cases, the Compulsory Process Clause, and its intended guarantee of equality of access to witnesses and the concomitant right to present exculpatory evidence, is a right that protects against a variety of restrictions on the defendant's ability to fairly present his case. *E.g., Wardius v. Oregon,* 412 U.S. 470 (1973); *Chambers v. Mississippi,* 410 U.S. 284 (1973); *Cool v. United States,* 409 U.S. 100 (1972); *Webb v. Texas,* 409 U.S. 95 (1972).

The Due Process Clause

This case implicates the Due Process Clause of the Fifth Amendment, as well as the Compulsory Process Clause of

the Sixth. Mr. Justice Black, writing for the Court in *In re Oliver,* 333 U.S. 257, 273 (1948), spoke of basic elements of due process required for a fair trial:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

Few rights are more fundamental than that of an accused to present witnesses in his own behalf. *E.g., Webb v. Texas,* 409 U.S. 95 (1972); *Washington v. Texas,* 388 U.S. 14, 19 (1967). The denial to a defendant of the ability to present critical evidence in his own behalf violates due process. *Chambers v. Mississippi,* 410 U.S. 284 (1973).

This case involves the government action of selecting certain witnesses and effectively denying access by an indigent criminal defendant to other witnesses. Because the Due Process Clause of the Fifth Amendment embodies basic conceptions of equal protection, the Fifth Amendment protects against governmental action which denies equal defense access to these witnesses. *Cf. Bolling v. Sharpe,* 347 U.S. 497 (1954).

The Mendez-Rodriguez Doctrine

In *United States v. Mendez-Rodriguez,* 450 F.2d 1 (9th Cir. 1971), the court was faced with a recurring problem. The defendant was charged with a violation of 8 U.S.C. §1324(a) (2) (transportation of aliens) in a four-count indictment. Three of the aliens who were present in his car at the time of the transportation were retained by the government after having been interviewed by Border Patrol agents,

and three others were returned to the Republic of Mexico without the defense being accorded the opportunity to interview or subpoena them for trial. Defense counsel wrote letters to the witnesses in Mexico requesting their presence at the trial, but none appeared. At the trial, the three witnesses who had been retained by the government testified that each entered illegally into the United States on the 8th of December 1969 and that after having walked for three hours they stopped beside a highway and entered a car which proceded until the car was stopped at Temecula, California. *Id.* at 3-4. The defendant testified at trial that he was approached by a man at a bowling alley near Oceanside who asked him for a ride, and was joined by five persons. Mendez denied knowledge of the illegal status of the passengers. *Id.* at 4. After conviction, Mendez appealed, arguing that his attempts to secure the other three witnesses to testify had failed due to the deportation of the witnesses beyond the subpoena power, and the impossibility of locating them in Mexico. *Id.* at 3-4.

The Ninth Circuit, confronted by the government's policy at the time of returning to Mexico all witnesses which it did not seek to retain for its own case, applied the principles of *Washington v. Texas* to hold that unilateral government action in deporting eyewitnesses who are also participants in the alleged acts constituting the crime was a deprivation of both due process and compulsory process. *Id.* at 4-5. The court held that although the government is under no obligation at all to search out and produce witnesses who may be favorable to the defense, it is a denial of due process when such witnesses have been made unavailable by the unilateral conduct of the government. The court quoted at length from the case of *Gregory v. United States,* 369 F.2d 185, 188 (D.C. Cir. 1966):

> Witnesses, particularly eyewitnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them. Here the defendant was denied that opportunity which, not only the statute, but elemental fairness and due process required that he have.
>
> . . . .
>
> A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined . . . . A related development in the criminal law is the requirement that the prosecution not frustrate the defense in its preparation of its case.

United States v. Mendez-Rodriguez, supra at 5.

In *Mendez-Rodriguez,* the government argued that it had not violated due process by making the witnesses unavailable because, although the witnesses had been returned to their country, they were available to Mendez if he desired to call them in preparation of his defense. The court felt that in view of the fact that the government returned the witnesses to Mexico, placing them beyond the reach of the subpoena power, "such argument is unworthy of the government."[27] *Id.* at 5.

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[27]The government's claim that this case does not involve the Compulsory Process Clause because "All of this Court's prior decisions interpreting that provision have dealt with the defendant's right to secure the attendance of witnesses . . . that was within reach of the court's process at the time he invoked that process" [G.B. at 10-11 n.4] is equally unworthy of the government. The deportation of witnesses beyond the subpoena power of the defense before counsel is appointed hardly insulates the government from the consequences of its action. Removing witnesses deliberately *before* a subpoena is served is constitutionally no different than precluding attendance after the defense has invoked compulsory process, when the government's initial removal of the winesses inevitably frustrates attendance at trial.

The defendant conceded that he was unable to show that the witnesses would have offered favorable testimony. In view of the fact that the government's actions deprived the defense of the opportunity to interview the witnesses, the court held that it would decline to indulge in speculation that the interviews would or would not have been fruitful. Because the government's action deprived the defendant of percipient eyewitnesses to the alleged offense, the court dismissed the charges. *Id.* at 5.

The *Mendez-Rodriguez* case has been cited in some 39 later cases, the majority of them Ninth Circuit decisions concerning the scope and circumstances for the application of the doctrine.[28]

In *United States v. Tsutagawa,* 500 F.2d 420, 423 (9th Cir. 1974), Circuit Judge J. Clifford Wallace explained the rationale of the *Mendez-Rodriguez* doctrine:

> The thrust of *Mendez-Rodriguez* is to prevent the basic unfairness of allowing the government to determine which witnesses will not help either side and then to release those witnesses, for all practical purposes, beyond the reach of the defendant. . . . The vice lies in the unfettered ability of the government to make the decision unilaterally. The Sixth Amendment guarantees a defendant the right to subpoena favorable witnesses. . . . Here, the government placed witnesses, who may have been favorable to the appellees, outside the power of our courts to require attendance. . . . A defendant has the right to formulate his defense

[28]*See,* for example, *United States v. McQuillan,* 507 F.2d 30 (9th Cir. 1974); *United States v. Tsutagawa,* 500 F.2d 420 (9th Cir. 1974); *United States v. Orozco-Rico,* 589 F.2d 433 (9th Cir. 1978) (*Mendez-Rodriguez* not applicable to status offenses); *United States v. Castillo,* 615 F.2d 878 (9th Cir. 1980). For an excellent synopsis and discussion of the *Mendez-Rodriguez* doctrine, *see United States v. Tariq,* 521 F.Supp. 773 (D.Md. 1981).

> uninhibited by government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense.

(citations omitted).

In *United States v. Castillo,* 615 F.2d 878, 882 (9th Cir. 1980), Circuit Judge J. Blaine Anderson reiterated this theme:

> The gist of a *Mendez-Rodriguez* violation lies in the interference with the opportunity to formulate a defense. Conduct by the government which prevents a defendant from interviewing potential witnesses and making an independent judgment on which witnesses should be called deprives a defendant of the fundamental right to plan and present a defense to criminal charges. . . . The deportation of alien witnesses places the witnesses beyond the reach of compulsory process and unfairly interferes with preparation of a defense.

(citations omitted).

Through the years, the Ninth Circuit has clarified its holding in *Mendez-Rodriguez* by defining the standard required for dismissal as the "conceivable benefit" test. *See United States v. Gonzalez,* 617 F.2d 1358, 1363 (9th Cir. 1980). This test recognizes the difficulty facing defendants in specifying what released witnesses would say while at the same time denying dismissals of indictments when the facts and circumstances demonstrate that the released witnesses could not have possibly benefitted the defense case. If there is no connection in time and place between the offense allegedly committed and the released witnesses, the Ninth Circuit does not require dismissal of the indictment. *See United States v. Martinez-Morales,* 632 F.2d 112 (9th Cir. 1980) (released witnesses not potential eyewitnesses to the inducing and encouraging offense); *United States v. Gonzalez,* 617 F.2d 1358 (9th Cir. 1980) (dismissal of

some counts of the indictment affirmed because alien may have been a witness to the conduct alleged in those counts and dismissal of other counts reversed because released witnesses had no connection to those counts and could not have conceivably benefitted the defendants with their testimony); *United States v. Sanchez-Murillo,* 608 F.2d 1314 (9th Cir. 1979) (released material witnesses had no connection with the defendant, did not witness any acts performed by the defendant, were not with the defendant at the time of his arrest); *United States v. Orozco-Rico,* 580 F.2d 433 (9th Cir. 1978) (released witnesses could not have conceivably helped a defendant charged with status offenses, therefore no prejudice due to their release); *United States v. Castellanos-Machorro,* 512 F.2d 111 (9th Cir. 1975) (released material witnesses had no connection with motel harboring operation that was basis of the indictment); *United States v. McQuillan,* 507 F.2d 30 (9th Cir. 1974) (released material witnesses had nothing to do with marijuana smuggled by the defendants, therefore no prejudice by their release). An analysis of these cases demonstrates that indictments are dismissed in the Ninth Circuit only when the released witnesses were eyewitnesses to or active participants in the offense and, therefore, were in a position to benefit the defendant through their testimony.

The *Mendez-Rodriguez* doctrine has been clarified in other ways. If defense counsel has an adequate opportunity to interview the witness, and fails to do so before the deportation of the witness, there is no violation. *E.g., United States v. Lomeli-Garnica,* 495 F.2d 313 (9th Cir. 1974); *United States v. Romero,* 469 F.2d 1078 (9th Cir. 1972). If a defendant knowingly and intelligently waives his right to have the government maintain the witnesses in custody for an interview by defense counsel, then the

Mendez-Rodriguez decision does not apply, because this right, like any other right, can be waived by the defendant.[29] *United States v. Lujan-Castro,* 602 F.2d 877 (9th Cir. 1979). The Ninth Circuit has approved the ordered release of material juvenile witnesses on humanitarian grounds. *United States v. Carrillo-Frausto,* 500 F.2d 234 (9th Cir. 1974). The court has made it clear that the *Mendez-Rodriguez* doctrine protects only against government action and that a witness' escape from custody by fraud or stealth does not give rise to a constitutional violation. *United States v. Hernandez-Gonzalez,* 608 F.2d 1240 (9th Cir. 1979); *United States v. Verduzco-Macias,* 463 F.2d 105 (9th Cir. 1972).

There are two essential elements involved in the *Mendez-Rodriguez* doctrine: (1) unilateral government action denying a defendant access to a witness; and (2) prejudice, i.e., loss of a conceivable benefit to the defendant from the missing witness' testimony. *United States v. Valenzuela-Bernal,* 647 F.2d 72, 75 (9th Cir. 1981).

The Ninth Circuit's decisions construing the *Mendez-Rodriguez* doctrine represent a careful, narrowly drawn, and conscientiously applied rule framed to assure that the defendant's Sixth Amendment rights to compulsory process and to fair treatment are respected, while at the same time avoiding undue expense or burden on the government. Given the fact that the government policy at the time of the *Mendez-Rodriguez* decision was to deport eyewitnesses who were participants in the events alleged to constitute the

[29]The government's present doubt about whether a defendant can intelligently decide to detain a witness [G.B. at 20-21 n.9] is in sharp contrast to the position it took before the United States Court of Appeals in the *Lujan* case.

offense,[30] the doctrine is eminently fair and reasonable. It does not require the indefinite detention of witnesses whose testimony is of no value whatsoever. All *Mendez-Rodriguez* requires is that the prosecution hold the witnesses for a brief period of time to make them available for defense interview. Unless the defendant can show after an interview with these witnesses that their testimony is material to his case, the witnesses may be released without any violation of the Constitution. Given the circumstances of the class of cases with which the court was dealing, *Mendez-Rodriguez* represents the minimal application of principles of due process, compulsory process, and fair play. In deciding *Mendez-Rodriguez* and its progeny, the Ninth Circuit has attempted to give clear guidance to the prosecution and law enforcement officers who are involved in the handling of these cases. This Court has recently recognized the value of a bright-line test in providing guidance to law enforcement personnel. *See New York v. Belton,* 453 U.S. ____ , 101 S.Ct. 2860, 2863 (1981); *Dunaway v. New York,* 442 U.S. 200, 213-14 (1979); *see also United States v. Bryant,* 439 F.2d 642, 652 (D.C. Cir. 1971). With the guidance of the Ninth Circuit, this rule has functioned successfully for over 10 years. The prosecution in this case seeks to have this Court overturn this carefully defined rule of law. Such a suggestion should be quickly rejected. In the absence of a clear bright-line rule that can be readily and easily applied by law enforcement personnel, prosecutors, and district courts alike, each case would generate interminable litigation. If the government were allowed to return to the situation that applied before the *Mendez-Rodriguez* decision, there would be open to the prosecution and its officials an enormous potential for abuse which would be difficult to detect.

[30]The government apparently seeks the approval of this Court in the instant "test case" to reinstate this practice.

Inevitably, innocent defendants would be convicted because of the lack of witnesses to corroborate their position.[31] If this Court were to ratify the government's position in this case, the determination as to which witnesses should be called by the defense would be made not by defense counsel acting intelligently and in the interest of his client, but by the Border Patro agent and the prosecutor whose interests can scarcely be considered as congruent with those of the person whom they seek to subject to criminal liability.[32]

Practice in the Southern District of California

In response to the *Mendez-Rodriguez* decision, the courts of the Southern District of California have adopted procedures which are designed to fairly ensure both the protection of the defendant's constitutional rights and the

[31]We disagree with the contention of the United States Attorney in the Southern District of California that material witnesses are never called to testify on behalf of defendants [G.B. at 20]. In the limited time available to respond to this claim we have discovered the following cases in which the defense called material witnesses: *United States v. Jose Martinez-Torres*, No. 77-0581, *United States v. Jose Bruno Carapia*, No. 78-0678; *United States v. Isidro Alderete-Salazar*, No. 78-0724; *United States v. Benjamin Sandoval-Marin*, No. 78-0632; *United States v. Erasto Espinoza-Valderas*, No. 80-0032; *United States v. Fructuoso Iniguez-Munoz*, No. 80-0464, and *United States v. Ignacia Gutierrez de Rodriguez*, No. 81-1309. This list does not include the vast number of cases where the government calls a material witness in its case-in-chief and the defense, who sought the detention of the witness, elicited exculpatory testimony during cross-examination. More importantly, the government neglects to mention the occasions when they dismiss charges or reduce the offense to a misdemeanor because material witnesses, detained by the defense, will offer exculpatory testimony at trial.

[32]The prosecutor in this case had previously been a law clerk for the district court judge presiding over the *Valenzuela* case before becoming an assistant United States attorney. He had never represented a person accused of a crime [Supp.R.T. 12, J.A. 69].

prevention of needless detention of any person held as a witness in a criminal case.[33]

An analysis of these procedures shows that the courts have adopted a set of procedures designed to protect the constitutional rights of criminal defendants, secure adequately the interests of the government, and prevent the needless detention of witnesses. If release is not available under the liberal application of the provisions of the Bail Reform Act, the courts have used depositions, some video taped [18 U.S.C. §3149, Rule 15, Federa Rules of Criminal Procedure], as a substitute for live testimony at trial to avoid the detention of witnesses.[34] In addition, the materiality hearing held at the time of arraignment on the indictment serves to ensure that only those witnesses whose testimony is material and helpful to either the government or the defense will be detained in custody, and that those witnesses, expressly requested by defense or government, whose testimony is merely cumulative or peripheral will be released forthwith. Although these procedures require speedy and diligent work by defense counsel and thorough and almost immediate investigation of the case, they serve to ensure that only those witnesses whose presence is absolutely necessary will be held pending the trial.[35] These several and complementary features have been effective, for the vast number of material witnesses are released after a very short period of time in custody.[36]

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[33]*Supra* at 6-9.

[34]Use of depositions has judicial approval. *United States v. King*, 552 F.2d 833 (9th Cir. 1976).

[35]The Speedy Trial Act, 18 U.S.C. §§3161, *et seq.*, is not the only incentive, for all the district judges accelerate the time for trial if there are a number of material witnesses in custody.

[36]The government's brief states this to be an average of slightly more than five days [G.B. at 18].

Dismissal under *Mendez-Rodriguez* is rarely asserted and even less granted. A survey of the alien smuggling cases in the Southern District of California for calendar years 1979, 1980, and 1981 puts the issue in perspective. In 1979, of 257 alien smuggling cases prosecuted, *Mendez-Rodriguez* motions to dismiss were filed in eight of these cases. One dismissal was granted. Of 199 alien smuggling cases filed in 1980, *Mendez-Rodriguez* motions to dismiss were filed in nine and again one motion was granted at the district court level. In calendar year 1981, there were 11 *Mendez-Rodriguez* motions to dismiss filed in a total of 239 alien smuggling cases. One motion was granted.[37]

In summary, the practice in the Southern District of California is calculated to minimize fiscal, administrative, and human costs, while ensuring adeuate protection of the constitutional rights of defendants. Despite government opposition to certain procedural devices to prevent needless detention (i.e., opposition to depositions), the actual practice belies the government contention that adequate protection of a person's constitutional rights is too costly to be afforded.

Elements of 8 U.S.C. §1324

The offense defined in 8 U.S.C. §1324(a) (2) does not have three elements, as the government suggests in its brief,[38] but five elements. The prosecution must prove that: (1) the

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[37]These statistics are a result of a survey of all cases filed in the District Court for the Southern District of California in the relevant calendar years. This Court may take judicial notice of these statistics pursuant to Rule 201(b), Federal Rules of Evidence. *See St. Louis Baptist Temple, Inc., v. FDIC*, 605 F.2d 1169 (10th Cir. 1979).

[38]G.B. at 30.

defendant transported an alien within the United States; (2) the alien had not been lawfully admitted or was not lawfully entitled to enter the United States; (3) the defendant knew that the alien was not lawfully admitted or was not lawfully entitled to enter; (4) the defendant knew that the alien's last entry was within three years of the date of the transportation; and (5) the defendant acted willfully in furtherance of the alien's violation of the law. *United States v. Gonzalez-Hernandez,* 534 F.2d 1353, 1354 (9th Cir. 1976). The statute is unusual in that two of the five elements of the offense relate not to acts of the defendant but rather to the acts or the status of the person who is the subject of the transportation. The government must prove that the alien's status is such that he entered illegally and must prove that the defendant acted substantially in furtherance of the alien's violation of law, that is to further the illegal entry of the alien involved in the case. It is for this reason that the material witness is critical to both the prosecution and the defense case, because it is his status and the facts surrounding his entry or stay in the United States that determine whether the defendant's actions constitute the mere driving of a car, or the commission of a serious federal felony for which the imposition of five years for each count (alien) can be imposed.[39] The trial of such a case revolves heavily around the acts of the defendant which constitute the transportation, the alien's own actions in entering the United States, the events leading up to the transportation, as well as the

[39]In *Rosales-Lopez v. United States,* 451 U.S. ____, 101 S.Ct. 1629 (1981), the defendant was given an 18-month term of imprisonment and a 30-year suspended sentence. According to information obtained from the Statistical Analysis and Reports Division of the Administrative Office of the United States Courts, the average sentence of imprisonment for 8 U.S.C. §1324 violations in the Southern District of California was 17.2 months during the year 1981.

defendant's knowledge and state of mind at the time of the transportation.

The government must prove not only that the defendant knew the alien transported had not been duly admitted to enter the United States or was not lawfully entitled to enter the United States, but also that the defendant knew that the alien "had illegally entered the United States within three years prior to the transportation." *United States v. Holley,* 493 F.2d 581, 582 (9th Cir. 1974); *Bland v. United States,* 299 F.2d 105 (5th Cir. 1962). Mere knowledge that the alien is not entitled to enter into the United States is insufficient. *United States v. Jacobo-Gil,* 474 F.2d 1213, 1216 (9th Cir. 1973). This element of the offense makes not only the circumstances surrounding the transportation of critical importance, but also elevates the evidentiary significance of any conversations, discussions, or contact that the defendant had with the persons transported. These critical facts must be examined to determine whether the defendant had knowledge that the illegal entry of the alien had occurred within three years.

Even the mere transportation of a person known to be an alien who has illegally entered the United States within the past three years is not sufficient in itself to constitute a violation of 8 U.S.C. §1324(a) (2). *United States v. Moreno,* 561 F.2d 1321 (9th Cir. 1977). The transportation involved must be "in furtherance of such violation of law" by the alien. Thus the trier of fact must examine what violation of law by the alien is alleged to have occurred, and whether the defendant's conduct substantially furthered that violation. In *Moreno,* the Ninth Circuit held that the transportation of aliens from one job site to another was only incidentally connected to the furtherance of the violation of law committed by the aliens. The court held that such

transportation was "too attenuated to come within the boundaries of § 1324(a) (2)." *Id.* at 1322. The court stated that where the transportation of an alien occurs there must be a substantial or direct relationship between the transportation and the illegal action of the alien. As the court pointed out:

> A broader interpretation of the transportation section would render the qualification placed there by Congress a nullity. To do this would potentially have tragic consequences for many American citizens who come into daily contact with undocumented aliens and who, with no evil or criminal intent, intermingle with them socially or otherwise. It could only exacerbate the plight of these aliens and, without adding anything significant to solving the problem, create, in effect judicially, a new crime and a new class of criminals. All of our freedom and dignity as people would be so reduced.

Id. at 1323.

The "in furtherance" element of the offense makes important an inquiry of the aliens involved in the case as to the ultimate destination of the transportation, how long they had been in the United States, and whether the transportation involved significantly furthered their illegal entry into the United States. In this regard, it is obvious that if there is transportation of more than one alien, the testimony of all the aliens is critical in determining the defendant's understanding of the alien's legality *vel non*, residence and length of residence in the United States *vel non*, and ultimate intended destination.

Deportation of the Two Material Witnesses by the Government Constitutes a Violation of Compulsory Process and Due Process

The government contends [G.B. at 10] that its deportation of percipient eyewitnesses or active participants in the events constituting the alleged offense does not violate either due process or the Compulsory Process Clause of the Sixth Amendment. This argument has been rejected by every appellate court that has reviewed the issue. Regardless of the government's position on prejudice, or dismissal as an appropriate sanction, it should be noted that there is absolutely no support for the position that the government may unilaterally deport eyewitnesses to an offense without violating the defendant's Sixth Amendment right to compulsory process and the Fifth Amendment right to due process. In *United States v. Calzada,* 579 F.2d 1358, 1360-61 (7th Cir. 1978), the court held:

> We agree with the Ninth Circuit because it seems to us beyond serious dispute that the essence of the right to compulsory process is lost when the government can act through its deportation powers to deprive a defendant of the testimony of an eyewitness to the crime for which he or she is charged.

The Fifth Circuit Court of Appeals in *United States v. Avila-Dominquez,* 610 F.2d 1266, 1269 (5th Cir. 1980), upon which the government places such heavy reliance in its brief, summarily dealt with this claim:

> We agree with the Ninth and Seventh Circuits that a criminal defendant's constitutional rights are violated if an alien witness is deported before the defendant is given an opportunity to interview the witness. The reasoning of those cases appears sound and we adopt it as our own, without repetition here.

Decisions of the courts of appeals in many cases have clearly established the principle that prosecutorial action interfering with defense ability to interview and present witnesses is a constitutional violation. The prosecution may not deny access to a witness by hiding him out. *See Freeman v. State of Georgia,* 599 F.2d 65 (5th Cir. 1979) (police detective concealed location of witness). Prosecution conduct similar to that in this case has been condemned. *Lockett v. Blackburn,* 571 F.2d 309 (5th Cir. 1978) (deliberate concealment by prosecutor of two eyewitnesses); *United States v. Opager,* 589 F.2d 799 (5th Cir. 1979) (prosecutor's refusal to provide informant's address despite court order thwarted defense ability to prepare). In *United States v. Pollard,* 479 F.2d 310 (8th Cir. 1973), the court held that the government was required to expend "every reasonable effort" to produce the informant witness whom the defendant sought to subpoena. In *Singleton v. Lefkowitz,* 583 F.2d 618 (2d Cir. 1978), the court held that where the state negligence had contributed to the unavailability of a witness, the Sixth Amendment right to compulsory process had been violated. Deliberate action causing loss of evidence has likewise been condemned. *See United States v. Morrison,* 535 F.2d 223 (3d Cir. 1976) (prosecutor intimidated witness leading to refusal to testify); *United States v. Jones,* 476 F.2d 885, 888 (D.C. Cir. 1973) (same); *United States v. Smith,* 478 F.2d 976 (D.C. Cir. 1973) (same); *Bray v. Peyton,* 429 F.2d 500 (4th Cir. 1970) (same); *Gregory v. United States,* 369 F.2d 185 (D.C. Cir. 1966) (prosecutor instructed witnesses not to speak to defense counsel except in his presence).

This Court has held that it is a violation of a defendant's Six Amendment right of compulsory process for the gov-

ernment to make witnesses unavailable to the defense. *See Webb v. Texas,* 409 U.S. 95 (1972) (the trial judge violated the defendant's right to compulsory process by threatening and intimidating a defense witness thereby rendering him unavailable as a witness for the defense). It should be noted that the same considerations govern the Sixth Amendment obligation to confront a defendant with the witnesses against him. In *Motes v. United States,* 178 U.S. 458, 471 (1900), this Court held that the state violated the defendant's right of confrontation by releasing a witness from jail and allowing the witness to disappear when the prosecution realized that the defendant might have wished to cross-examine this witness at trial. The measure of the government's duty to preserve evidence is the same under both the Confrontation and the Compulsory Process Clauses, because both clauses are correlative aspects of the Sixth Amendment obligation to make witnesses available for defendants for evidence in their defense. *See* Westen, *The Future of Confrontation,* 77 Mich.L.Rev. 1185, 1205-07 (1979); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv.L.Rev. 567, 601-24 (1978).

The decisions of this Court in *Pointer v. Texas,* 380 U.S. 400 (1965), and *Barber v. Page,* 390 U.S. 719 (1968), albeit in the context of the Confrontation Clause, clearly support the unanimous finding of all appellate courts that have decided this issue that the government's constitutional obligation to the defendant is violated when the government fails to take the minimal step of making available critical witnesses for potential use by the defense, when the government has exclusive custody and control of the witnesses.

In an Adversary System of Criminal Justice Border Patrol Agents and Prosecutors are Ill-equipped to Decide for the Defense who the Witnesses Should Be

Despite the unanimity of courts in finding a violation of compulsory process, the government raises two additional arguments in this case in an attempt to convince this Court that the deportation of eyewitnesses before a defense interview does not violate the Sixth Amendment. First, the government contends that the Border Patrol agent in this case, after a cursory interview, was unable to find any exculpatory evidence. Second, the government argues for the first time before this Court that there was no showing of prosecutorial bad faith, and consequently there can be no Sixth Amendment violation.

The suggestion that an interview by representatives of the prosecution of potential defense witnesses to determine if they have exculpatory evidence to give to the defense is sufficient to satisfy the demands of the Sixth Amendment has been repeatedly rejected by the courts. *E.g., Alderman v. United States,* 394 U.S. 165, 180-85 (1969); *Dennis v. United States,* 384 U.S. 855, 874-75 (1966); *see also United States v. Mendez-Rodriguez, supra* at 4-5; *United States v. Tsutagawa, supra* at 123; *Gregory v. United States, supra* at 188. There are several obvious reasons why this is so. First, as in this case, the interview by the prosecution is likely to be cursory, perfunctory, and unintelligent. The Border Patrol agent involved had no legal training, and the assistant United States attorney who chose this case as his "test case" had never represented a single criminal defendant in his life. Thus, the persons who interviewed the witnesses in this case had neither the legal acumen nor the interest and motivation to discover exculpatory evidence to aid the defendant. Second, there

was no record of any kind preserved of the statements of the witnesses who were released.[40] Despite the Border Patrol's ready access to tape recording equipment, neither a taped interview, nor a written statement was taken by the Border Patrol agent in this case. As to the contents of the interviews with the Border Patrol agent, we know only that the interviews took a very brief period of time, and that the released witnesses according to the Border Patrol agent told "basically the same story" as the retained witness [Supp.R.T. 8-9; J.A. 66]. There is no indication in the record as to whether the Border Patrol agent asked questions which would be essential to the defense investigation of this case, including those pertaining to discussions or conversations held between the released witnesses (or lack thereof) and the defendant, length of residence of the released witnesses in the United States, whether the witnesses had been in the United States on one or more occasions before the instant case, the events that occurred at the house during the six days that the defendant was present which may have given rise to a duress or coercion defense,[41] or other such relevant facts. In short, we have a cursory interview resulting in a

[40]All experienced judges, prosecutors, or defense lawyers in the Southern District of California know that these material witnesses, all subject to possible criminal prosecution (illegal entry, 8 U.S.C. §1325) and deportation or return to Mexico, give widely varying interpretations of what occurred. Much of this is caused by their initial desire to give their captors the information they desire in the hopes of avoiding criminal prosecution themselves or in seeking their early return to Mexico. Later, when confronted with conflicting statements, their stories change. These are the most malleable of witnesses.

[41]In his sentencing argument, Valenzuela's counsel stated that the defendant was literally kept "hostage" at the house in Escondido, "waiting until the people who smuggled him in allowed him to leave . . ." [R.T. 63; J.A. 57].

conclusionary determination by a Border Patrol agent that the witnesses would not help the defendant. What we do know, however, is that prosecutors are not and should not be competent to judge the exculpatory nature of potential defense testimony. It is for the defendant—the party with the strongest interest in and knowledge of the potential defense—to assess the materiality of potential defense evidence. *See Alderman v. United States, supra* at 180-85 (1969); *Dennis v. United States, supra* at 874-75 (1966).

The record further demonstrates that the prosecutor acted under erroneous information. He was advised by a Border Patrol investigator that "there had been a complete confession by the defendant" [Supp.R.T. 7; J.A. 65]. However, the defendant's statement is more correctly characterized as an admission because he never confessed to transporting the aliens with knowledge that they were illegal aliens who had been in the United States less than three years. *United States v. Valenzuela-Bernal, supra* at 75. The prosecutor did not read a copy of the defendant's "confession" before he made his unilateral decision to release the material witnesses because a transcript was not available until approximately two and one-half monts later [Supp.R.T. 9; J.A. 67].

More alarming is the government's argument that the prosecutor should be allowed to make the determination whether the witnesses' testimony is exculpatory or not and its complete denigration of and ignorance of the adversary process upon which our criminal justice system is based.[42]

[42]Professor Westen writes that "[t]he history of compulsory process is the story of the development of the adversary process" and that the defendant's right to present a defense is independent of the rights possessed by the prosecution. Westen, *Compulsory Process I, supra* at 175-76.

As this Court observed in *United States v. Nixon, supra* at 709:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

The adversary nature of our system of criminal justice has been recognized by this Court on numerous occasions. For example, in *United States v. Ash,* 413 U.S. 300, 318-19 (1973), this Court decided that a defendant's Sixth Amendment right to counsel did not require the presence of his attorney during a photographic lineup because defense counsel has an equal ability to seek and interview witnesses himself. In *Williams v. Florida,* 399 U.S. 78, 82 (1970), this Court once again emphasized the adversary nature of our system of criminal justice in upholding a Florida notice of alibi rule:

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

In holding that the Due Process Clause of the Fourteenth Amendment forbids enforcement of a notice of alibi rule which does not provide reciprocal discovery rights to the defense, this Court recognized that there must be a "balance of forces between the accused and his accuser." *Wardius v. Oregon,* 412 U.S. 470, 474 (1973).[43] The claim that the government can decide for the defense which eyewitnesses will be available for the litigation distorts the adversary nature of our system which the Fifth, Sixth, and Fourteenth Amendments are designed to protect.

Because the dual aim of our criminal justice system is "that guilt shall not escape or innocence suffer," *Berger v. United States,* 295 U.S. 78, 88 (1935), it is requisite that both sides in the adversary system be given access to important and relevant facts. *See United States v. Nobles,* 422 U.S. 225 (1975); *United States v. Nixon, supra* at 709 (1974); *Williams v. Florida, supra* at 82 (1970). The government's argument in this case confuses the role of the prosecutor. It is the prosecutor's function, as it was throughout this case, to gather evidence of guilt and to prosecute the case in the courts. To suggest that this same prosecutor is able to make a fair, full, and thorough investigation and a deliberate and impartial assessment of the value of potential witnesses' statements for the defense is to engage in a charade, and to make a sham of our adversary system of justice.

The Deliberate Deportation of the Material Witnesses Violated the Defendant's Constitutional Rights Regardless of the Good or Bad Faith of the Prosecution

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[43]*See* Westen, *Compulsory Process I, supra* at 106-15.

The government argues for the first time in the brief before this Court that lack of prosecutorial bad faith in causing the deprivation of the witnesses insulates the government from a finding of a Sixth Amendment violation. This argument is not properly before the Court, having been raised neither in the district court nor in the court of appeals.[44] "Good faith" should not encompass a manufactured "test case," for the concept envisions a correct application of the law which later is found to be erroneous. Here, the prosecutor planned to challenge the known law of the Circuit. "Good faith" would be enlarged to a blanket excuse for prosecutorial defiance of the law or misconduct, which doctrine would be a poor standard to announce for an officer of the court.[45] Thus, the prosecutor deliberately deprived the defendant ot witnesses in knowing violation of the well-established precedent of *Mendez-Rodriguez*. While we do not argue that this necessarily constituted prosecutorial bad faith, it can hardly be characterized as "good faith."[46]

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[44]*Steagald v. United States*, ____ U.S. ____, 101 S.Ct. 1642, 1645-47 (1981).

[45]We do not address the issue of the ethical propriety of a prosecutor *deliberately* violating a clear principle of law in order to raise an appellate issue before the Court. But it is clear that the prosecution in this case has deliberately chosen a case whose facts they feel are most favorable to their position in seeking to present the "test case" to this Court.

[46]The prosecutor's conduct in this case arguably violated the American Bar Association' Standard For Criminal Justice which provides that: "A prosecutor should not discourage or obstruct communications between prospective witnesses and defense counsel." *American Bar Association Standards for Criminal Justice: The Prosecution Function*, Standard 3-3.1(c) (1980).

Even if one accepts the government's self-serving description of the prosecutor's own state of mind, it is irrelevant whether the prosecutor acted in good faith or in bad faith in deporting the witnesses beyond the subpoena power. The controlling fact is that the defendant is being deprived of information that may refute the prosecution case or may prove his defense. *See generally* Westen, *Compulsory Process I, supra* at 173-75. The Seventh Circuit Court of Appeals in *Calzada* in addressing this identical issue held that "failure to prove willful misconduct is irrelevant to determining the appropriateness of the district court's dismissal of a defendant's indictment." *See also United States v. Bryant, supra* at 651. In *Singleton v. Lefkowitz, supra* at 625, it was the negligence of the state authorities in releasing the witness from custody that led the court to find that the defendant's right to compulsory process was violated. Indeed in *Washington v. Texas,* this Court did not find that the prosecutor acted in bad faith in invoking the state statute that prohibited the accomplice testimony, nor did the prosecutor in *Chambers v. Mississippi,* 410 U.S. 284 (1973), act in bad faith in invoking that state's voucher rule and hearsay rules. Therefore, even assuming that the prosecutor in this case acted without bad faith, his deliberate deportation of the witnesses, like the prosecution objections in *Chambers v. Mississippi* and *Washington v. Texas,* nonetheless had the effect of violating the defendant's compulsory process rights. Given the effect of denial to the defense of witnesses, prosecutorial motivation is, for this case, irrelevant.[47]

[47]Professor Westen writes that the prosecution should be held responsible for the absence of defense witnesses if, through the wrongful conduct of the prosecution, these witnesses became unavailable. If the witnesses are unavailable due to conduct of the prosecution, the prosecution must bear the consequences of the loss of the witnesses. Westen, *Confrontation and Compulsory Process,* 91 Harv.L.Rev., *supra* at 595-96.

The Defendant is Entitled to Relief upon a Showing that the Witnesses Deported by the Government were Eyewitnesses to or Participants in the Alleged Offense Whose Testimony Might Have Been Material to the Case

The government argues that unless a defendant, after the government has removed the witness from the subpoena power and deprived him of an interview, can make a "concrete and substantial showing that the witness might have offered material exculpatory evidence," then this Court should find that no Sixth Amendment violation occurs [G.B. at 24]. Although the government's brief is somewhat deficient in explaining how the defense is supposed to make a specific and concrete showing as to what a witness would say without the opportunity to speak with the witness for at least a brief time, it insists that this is the appropriate showing that must be made by the defense in order to obtain relief.[48]

The Ninth Circuit in this case placed the burden of excuse with the party removing the witness. Dismissal was not required if the government could show that the witness could not "conceivably benefit" the defendant's case. To require a specific concrete showing by the defendant that a witness would testify in a particular fashion, after having denied the defense the right to speak to or investigate that witness' testimony, exaggerates the role of the prosecutor in a criminal case. Of the essential participants in criminal cases,

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[48]With access to the witness, the government's proposed standard is an appropriate one to apply to those cases in which a witness is released after the magistrate finds an inadequate showing by the defense to justify continued detention of the witness, for in such a case, the defense would have interviewed the witness, and can legitimately be held to such a standard. Without access, it is an impossible requirement for the defendant alone is not an adequate source of what the witness knows or will state.

because of his power to control the investigation, the prosecutor should be the most accountable for his manipulation of the case before it comes to court. Criminal trials must permit defense investigation, for otherwise trials would degenerate into staged performances with the prosecutor-director selecting the witnesses. The government, which denies the right to interview and subpoena the witness, should not be allowed to shift to the defense a burden it has made impossible to satisfy.[49]

This government argument was laid to rest long ago. Chief Justice John Marshall in the *Burr* case held that Burr could not be expected to describe the contents of letters which he had subpoenaed, which he had not yet seen:

> Now if a paper be in the possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents? If the opposite party be required to produce his books on a particular subject, it is not necessary that the entry on those books should be stated in order to entitle the applicant to his motion. He cannot be expected to make such a statement.

United States v. Burr, supra, at 191. Addressing this same issue, Professor Westen has written: "[I]f the defendant has been unable to interview witnesses, . . . then it is entirely

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[49]The government must be made to account for the deliberate removal of a witness. The burden must be on the party that exercised the power. The removal of percipient witnesses who may have knowledge of essential issues, i.e., coerced confession, improper search, insanity, entrapment, deprives the defendant of his right to challenge the government's case. More importantly, a defendant might not appreciate the significance of such issues or the facts upon which they are based. Without access to the witnesses it is impossible to properly investigate the given statements or *to develop or pursue other leads.*

unreasonable to expect him to set forth their testimony precisely." Westen, *Compulsory Process II, supra* at 274. Professor Westen also believes that "If the most a diligent defendant can do is provide some factual basis to support the belief that a witness may be material to his case, the right to compulsory process includes the opportunity to discover at trial precisely what the witness will say." Westen, *Compulsory Process II, supra* at 275. In those situations in which it is unreasonable to expect the defendant to be able to relate the precise nature of a potential witness' testimony, it should suffice if he can show that there is "any reason for supposing that the testimony may be material." *United States v. Burr, supra* at 38. In short, the most the defendant should be required to provide is a showing that the witnesses were, in fact, eyewitnesses to the offense, and participants in the events surrounding the alleged offense. To require more does injustice to the constitutional language which contains no precondition or limitation on the right to compulsory process.

In seeking the grant of certiorari, the government relied upon an ostensible conflict in the circuits regarding the standard of harm required to justify dismissal for a *Mendez-Rodriguez* violation. *See* Pet.App. 8-9. In fact, the "conflict" may be the result of little more than the misunderstanding of the Fifth Circuit panel in *United States v. Avila-Dominguez, supra*, that *Mendez-Rodriguez* embodied a rule of "automatic dismissal" for a violation. As the Ninth Circuit made clear in this case, the rule is not "automatic dismissal" but rather dismissal upon a showing that the missing witnesses could conceivably have assisted the defense. *United States v. Valenzuela-Bernal, supra* at 74. As the Fifth Circuit pointed out in *United States v. Henao*, 652 F.2d 591, 593 (5th Cir. 1981); "[W]e set a very low threshold for prejudice. The

defendant need not show prejudice 'with any degree of assuredness' *Avila-Dominguez* at 1269." The *Henao* court stated the Fifth Circuit rule as requiring the statement of "a plausible theory" or "some suggestion" as to how the deported witnesses could have assisted the defense. *Id.* Whether the standard required is denominated "conceivable benefit" (*Valenzuela-Bernal*) or "some suggestion" or "plausible theory" (*Henao*) is a difference of semantics rather than substance. Under either formula, the defense is not required to state specifically what the witness would have said and is entitled to dismissal if the deported witness could possibly have assisted the defense. In a case in which the witness is an eyewitness to or participant in the events constituting the alleged offense, and is made unavailable by government action, the standard has been met. Whatever the verbal formulation, Valenzuela was entitled to a dismissal.

The government relies heavily on the case of *Roviaro v. United States*, 353 U.S. 53 (1957), which held that where disclosure of an informer's identity or the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair trial, the government's privilege must give way, and the government must elect between disclosure of the informant's identity and dismissal of the criminal prosecution. The Court found the informer had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might have been a material witness as to whether the accused knowingly transported the drugs as charged. The instant case is remarkably similar to *Roviaro*. The witnesses in this case who were deported by the government had obviously taken a material part in bringing about the transportation with which Mr. Valenzuela was accused, had been present with the accused at the occurrence of the alleged crime, and clearly

might have been material witnesses as to whether or not the accused knowingly committed the offense. In effect, the Court in *Roviaro* held that if the defendant could show that the informant could provide a "conceivable benefit" to the defense, then disclosure was required under the Constitution. The Court explained its decision:

> The circumstances of this case demonstrate that John Doe's possible testimony was highly relevant and *might* have been helpful to the defense. . . . His testimony *might* have disclosed an entrapment. He *might* have thrown doubt upon petitioner's identity or on the identity of the package. He was the only witness who *might* have testified to petitioner's possible lack of knowledge of the contents of the package that he "transported" from the tree to John Doe's car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, *was a matter for the accused rather than the Government to decide.*
>
> Finally, the Government's use against petitioner of his conversation with John Doe while riding in Doe's car particularly emphasizes the unfairness of the nondisclosure in this case. The only person, other than petitioner himself, who could controvert, explain or amplify Bryson's report of this important conversation was John Doe. Contradiction or amplification *might* have borne upon petitioner's knowledge of the contents of the package or *might* have tended to show an entrapment.

Id. at 63-64 (emphasis added). It was enough for this Court in *Roviaro* that the testimony of the informant *might have* helped the defendant's case. This very case is precisely on point with *Roviaro*. Counsel pointed out at the motion hearing that the witnesses might "get on the stand in a trial and say they had not made arrangements or told him they were citizens, or they had a green card . . ." [R.T. 38, J.A. 86].

Indeed given the fact that Mr. Valenzuela, a 21-one-year-old Mexican, was "almost kept hostage in a drop house up in Escondido, waiting until the people who smuggled him in allowed him to leave and drive a load to Los Angeles so he could get to his ultimate destination" [R.T. 63, J.A. 57], and the fact that one of the two witnesses released had apparently participated in driving a car containing the three witnesses in this case from the border to Escondido, it appears that Mr. Valenzuela may have been able, had the government not deported the witnesses, to make a showing that duress was involved in the instant case and that he acted in order to avoid being held captive in the house in Escondido where he was staying. It may have been that one of the two witnesses released by the government was in fact a smuggler who was involved in forcing Valenzuela to drive. These are hardly facts that the witnesses would have disclosed to the Border Patrol agent in the courts of a 10- or 15-minute interview, especially if they wanted to be released immediately to Mexico. The point of this case is that Mr. Valenzuela, like the petitioner in *Roviaro*, due to the unavailability of the witness, was unable to present the defense at trial, or even to explore the viability of the defense, due to unilateral prosecution action.

If instead of deporting the two witnesses involved in this case, the government had claimed the informant's privilege to avoid divulging their identity, there is no doubt that *Roviaro* and its progeny would have required the government in such a situation to either disclose the identity of the witnesses, or to dismiss the prosecution.[50] The government should be in no better position because instead of claiming anonymity for the

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[50]*See*, for example, *United States v. Ayala*, 643 F.2d 244 (5th Cir. 1981).

witnesses, it unilaterally chooses to make them unavailable without interview.

The government misunderstands the appropriate standard of materiality. A witness is material if his testimony "could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972), quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959). These witnesses which were deported by the government were material. They were eyewitnesses to the alleged offense. They were, in addition, because of the definition of U.S.C. § 1325 (illegal entry), engaged in the same misconduct as the defendant. They were in effect accomplices, but at the prosecutor's discretion could have been named as principals in the alien smuggling venture.[51] The testimony of these witnesses was not only potentially helpful to the defendant, but was essential to a fair determination of the outcome of the case. The deprivation of material eyewitnesses by unilateral government action is, as in *Roviaro*, unfair, when the prosecution seeks to use other eyewitnesses to the alleged offense in order to impose criminal liability. The prosecution cannot be allowed on the one hand to seek criminal sanctions while on the other denying the defendant access to evidence which could potentially prove his innocence.

The government argues that Valenzuela's showing of materiality and relevancy of the missing witnesses' testimony

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[51]The defendant's selection apparently arose out of his status as driver of an automobile that avoided Border Patrol officers at high speed, but the occupants could have easily been charged with the same offense or aiding and abetting (18 U.S.C. §2). The broad discretion in charging, misdemeanor or felony, or not at all mandates that a thorough factual understanding of the event be known to the prosecutor and, once electing to charge, that factual basis should be subject to the strictest scrutiny not sealed in secrecy by removal of witnesses.

must approach the showing made by the defense in *Washington v. Texas* [G.B. 15 24]. In *Washington v. Texas*, Fuller was an eyewitness to the offense who was prepared to provide exculpatory testimony on behalf of the accused. The defense in *Washington v. Texas* could make a specific offer of proof because the defense had access to Fuller before trial but was unable to provide him as a witness at trial due to the arbitrary state statute. In the instant case, the arbitrary decision by the government prosecutor not only deprived the defendant of an opportunity to call the missing witnesses at trial, but deprived the defense of minimal access to the witnesses for the purpose of interviewing them before trial. It is only the government's arbitrary act of removal of these witnesses before the defendent had an opportunity to interview them that precludes a positive showing of materiality.

The government argues finally that the defendant should be required to make some presentation showing what the testimony of the witnesses would be. The government argues "it is ridiculous in most cases to conclude that the defendant cannot know what the witness could say on his behalf" [G.B. at33]. The defendant's knowledge is not co-extensive with the witnesses, and even where there is overlap, the witnesses may have a more informed or accurate perception. First, the defendant has a Fifth Amendment right not to testify in any proceeding. As the *Roviaro* Court noted, "unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness." *Id.* at 64. Second, the defendant, unlike his counsel who would be able to speak to all witnesses, may not have witnessed transactions that would be relevant. For example, the defendant may not have knowledge as to whether the witnesses were or were not in fact illegal aliens, or when their last entry into the United States had been. If the two aliens in this case had been United

States citizens, or had entered the United States legally five years before the offense, this would be extremely relevant evidence, which would not necessarily be known to the defendant. Third, it is often the case that poorly educated citizens from Mexico with a different language, culture, social status, and legal system are often unable to effectively communicate the essential facts to their appointed counsel, but resort to general conclusions based on unwarranted assumptions that our court system is the same as theirs. It is difficult to acquire complete and soul-disclosing confidence in their appointed counsel, a foreigner and stranger to them, and natural reticence may preclude investigation of critical facts. Finally, it is simply unfair to place upon the defense the burden of divulging information to which the prosecution has deliberately denied it access.

In sum, the real question is who should bear the risk of error when the exact nature of the witnesses' testimony can never be known because the government has deported them. The equitable answer is the party most at fault for destroying.[52] the evidence should bear that risk. This is particularly so when the government has violated established court guidelines for the preservation of evidence, guidelines which the prosecutor intentionally transgressed for the purpose of setting up a "test case." Unless the government is required to assume the consequences for the loss of the witnesses in this case, this change without risk, a form of "license" to violate the law under the guise of anticipated judicial reform. Justice Brandeis best commented on the duty of government to comply with the law.[53]

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[52]*Cf. United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971).

[53]Dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 485 (1928): "Our government is the potent, the omnipresent teacher . . . ."

II.

A. DISMISSAL IS THE ONLY APPROPRIATE SANCTION FOR THE CONSTITUTIONAL DEPRIVATION IN THIS CASE.

Relying primarily on this Court's decision in *United States v. Morrison*, 449 U.S. 361 (1981), the government argues that even assuming a constitutional violation in this case, the dismissal of the indictment was inappropriate.[54]

The result in *Morrison* is easily distinguishable because all the persons involved were available when the Court looked for prejudice. Although the agents disparaged her counsel and interrogated her without him, Morrison made no statement. Morrison alleged no adverse effect. The reasoning in *Morrison* is applicable because a showing of "demonstrable prejudice, or substantial threat thereof" is sufficient to result in dismissal of an indictment when constitutional rights are violated. *Id.* at 365. The Court in *Morrison* noted once there is a showing of some adverse consequence either to the representation received by the defendant, or to the fairness of proceedings leading to the conviction, dismissal is appropriate. *Id.* Given the deportation and deprivation of two eyewitnesses and participants in the events of this case, it is clear that the fairness of the proceedings was substantially impaired by the unilateral action of one party which deprived the other of percipient witnesses.

The government's citations of *United States v. Lovasco*, 431 U.S. 783 (1977), and *United States v. Marion*, 404

[54]All courts of appeals, including the Fifth Circuit in *Avila-Dominguez*, *supra*, have agreed that dismissal is the appropriate remedy for a *Mendez-Rodriguez* violation.

U.S. 307 (1971), are inapposite. *Marion* and *Lovasco* dealt with due process claims involving pre-indictment delay. In neither of those cases was there deliberate prosecution action to harm the defendant. Likewise, the loss to the defense in those cases was caused by the passage of time, rather than the deliberate manipulation by the government.

Previous decisions of this Court clearly indicate that dismissal is not only appropriate, but indeed constitutionally required in the circumstances of this case. In *United States v. Reynolds*, 345 U.S. 1 (1953), this Court recognized that in criminal cases the government's invocation of evidentiary privileges that deprives the defense of important evidence or witnesses requires that the invocation is at the price of dismissal of the criminal case. *Id.* at 12. *See also United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946); *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944). In *Jencks v. United States*, 353 U.S. 657 (1957), this Court held that the criminal case must be dismissed when the government on the ground of privilege elects not to comply with an order to produce, for inspection by the defendant, relevant statements or reports in its possession touching upon the subject matter of a government witness' testimony. In *Jencks* the Court quoted the language of *Reynolds* with approval:

> The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense . . . .

United States v. Jencks, *supra* at 671. In *Roviaro v. United States*, *supra* at 60-61, this Court held:

> Where the disclosure of an informer's identity, or of the contents of his communciation, is relevant and helpful to

the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.[55]

See also id. at 65 n.15.

This Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974), suggests dismissal is the appropriate sanction in a case where the defendant's Sixth Amendment right to confront witnesses is infringed by a privilege of the witness to remain silent. In *Davis*, this Court held the defendant's right to question a juvenile witness about his record was "paramount" and if the state wished to preserve the juvenile's privilege it had to refrain from using him as a witness in the case. *Id.* at 320. Since the juvenile was deemed a "crucial witness for the prosecution," the probable consequence of not using him as a witness would have been dismissal of the case. *Id.* at 310. Under compulsory process analysis, the result should be the same. The only sanction that adequately satisfies the defendant's interest in obtaining the withheld evidence he needs to rebut the government's case or support his own affirmative defense is dismissal of the prosecution.

In the instant case the witnesses are unavailable not because of an invocation of government privilege, but because of deliberate government action deporting the witnesses, ostensibly for purposes of reducing the expenditure of funds, or avoiding administrative difficulty for the government. The fact that the witnesses are unavailable not due to the invocation of a privilege but due to the government action undertaken for an alternative rationale is constitutionally

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[55]Professor Westen notes that this "language is suggestive of compulsory process." Westen, *Compulsory Process I*, *supra* at 162.

irrelevant. What is of importance is that the government's action, whether that be invocation of a privilege or immediate deportation of a witness, has resulted in the deprivation to the defense of evidence which could potentially be used to exculpate the defendant. As in the *Jencks* and *Roviaro* cases, the government action has deprived the defense of potentially significant evidence and, as in those cases, the government must be required "to choose between privilege and prosecution." *See* Westen, *Compulsory Process I, supra* at 161-62. *See also United States v. Burr, supra*; *United States v. Nixon, supra.*

The government suggests that in place of dismissal, the defendant should have been forced to agree to the stipulation proposed that "neither of the absent aliens ever told respondent they were illegally present in the United States" [G.B. at 38]. This position is in error. First, the defense could not stipulate to the government proposal because the witnesses had not in fact been interviewed to determine whether the proposal was accurate. Secondly, the proposed stipulation was inadequate because it failed to remedy the basic evil caused by the government's action, that is the lack of access by the defense to other potentially exculpatory evidence which would have been revealed in an interview. For example, the witnesses may have told Mr. Valenzuela that they were legally in the United States, or that they were citizens of the United States, or that they had "green cards."[56] They may have told Mr. Valenzuela other facts that led him to reasonably infer that they were legally in the United States. Or the witnesses may have been illegally in the United States, but may in fact have resided in this country for more than three years. The point is that the

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[56]This is the common term used for the Alien Registration Receipt Card, called the I-151, 8 C.F.R. 299.1.

government's action prevented the discovery of these potentially exculpatory facts, and a mere proposed stipulation would not take the place of adequate pretrial investigation and interview which was denied regardless of any proposed stipulation. Third, the government's suggestion is inappropriate because in this case the government had available witnesses, including Border Patrol agents and an illegal alien, who were able to testify before the trier of fact. The presentation of such demeanor evidence is critical to an assessment of credibility, and the government's forced stipulation proposal would require a substitute form of testimony which would deny the defendant the opportunity to present evidence of his witness' demeanor and credibility. In any resolution of credibility, the jury would be forced to choose between the government's evidence in the form of live witness testimony, and an inferior and dry stipulation which is inadequate to preserve a defendant's rights. *See* Westen, *Compulsory Process II, supra* at 301. Every trial lawyer knows the ploy which occurs when his opponent offers to "stipulate" to a piece of evidence whose effect upon the trier of fact is significant. The government should not be allowed to force the defense to use an inferior and insufficient stipulation in place of live testimony of witnesses, especially when the government's action has left it in the position of being able to present such credible demeanor evidence in support of its own case.

The respondent agrees with the government at least in one respect in this case. This is not a case which involves a request to the Court to suppress evidence of guilt [G.B. at 38]. This is a case in which the defense is not trying to exclude incriminating evidence, but to introduce exculpatory evidence. It is a case that falls more in the category as cases such as *Brady v. Maryland*, 373 U.S. 83 (1963), *Roviaro v.*

United States, Chambers v. Mississippi, and *Davis v. Alaska*. In order for the truth to be adequately determined, it is necessary that the trier of fact be entitled to "every man's evidence." *See United States v. Nixon, supra* at 709. This Court should not sanction the government's action in this case to limit the right of the defendant to present every man's evidence by allowing the government to handpick the witnesses who will be available for the court to hear. Justice requires that the government bear some minor inconvenience in order that the truth be determined.

B. THE GOVERNMENT USURPATION OF THE ROLE OF DEFENSE COUNSEL REQUIRES DISMISSAL.

"It is manifest that there is as much necessity for counsel to investigate matters of fact, as points of law, if truth is to be discovered." Byrne, II *Of Crimes and Punishments*, (1795-1796), quoted in *Powell v. Alabama*, 287 U.S. 45, 62-63 n.1 (1932). The duty of defense counsel to seek out and interview percipient witnesses in preparation of the defense is an obvious professional responsibility.[57] If the defense lawyer had failed to interview these witnesses, the client would have had a legitimate claim for the ineffectiveness of defense counsel—a Sixth Amendment violation. If the prosecutor precludes the performance of this essential defense responsibility, there has been an overreaching by the prosecutor and demonstrable interference in the defense function so that dismissal of the indictment is necessary.

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[57] *American Bar Association Standards for Criminal Justice: The Defense Function* (1979), Standard 4-4.1 (Duty to Investigate) provides:

> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . *The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.*" (emphasis added.)

The prosecutor is but one of the litigation triumvirate in the criminal court process. His power is checked by the court, for defense counsel, shielded only by the law, has no control over the prosecutor. Such intentional manipulation of witnesses by the prosecutor manifests a control over the court process and defense function that should not be tolerated in a system that seeks fairness through the adversary system.[58]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN J. CLEARY
EUGENE G. IREDALE
CRAIG E. WEINERMAN
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101-5070
(714) 234-8467
FTS 895-5240
Counsel for Respondent

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[58]This Court recently in *Polk County v. Dodson*, ___ U.S. ___, 102 S.Ct. 445, 450 (1981), noted: "In our system a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness." Pre-court prosecutorial removal of uninterviewed and potential defense witnesses subordinates defense counsel to the prosecutor and destroys his professional independence.

Petitioner's Reply Brief

Supreme Court, U.S.
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No. 81-450

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

RICARDO VALENZUELA-BERNAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases:	Page
Branzburg v. *Hayes*, 408 U.S. 665	7
Churder v. *United States*, 387 F.2d 825	8
Dennis v. *United States*, 384 U.S. 855	11
Israel v. *McMorris*, No. 81-189 (Feb. 22, 1982)	2
Jencks v. *United States*, 353 U.S. 657	11
Roviaro v. *United States*, 353 U.S. 53	7
Suarez v. *United States*, 582 F.2d 1007	7
United States v. *Armijo-Martinez*, No. 80-1798 (6th Cir. Feb. 5, 1982)	13, 14-15
United States v. *Brenneman*, 455 F.2d 809, cert. denied, 408 U.S. 923	7-8
United States v. *Brown*, 548 F.2d 204	7
United States v. *Burr*, 25 F. Cas. 187	9, 10
United States v. *Clark*, 482 F.2d 103	7
United States v. *Eddings*, 478 F.2d 67	8
United States v. *Estrella*, 567 F.2d 1151	7
United States v. *Ferrone*, 438 F.2d 381, cert. denied, 402 U.S. 1008	8
United States v. *Herbert*, 502 F.2d 890, cert. denied, 420 U.S. 931	7
United States v. *Lovasco*, 431 U.S. 783	11
United States v. *Marion*, 404 U.S. 307	11
United States v. *Morrison*, 449 U.S. 361	11, 14
United States v. *Reynolds*, 345 U.S. 1	11
United States v. *Rose*, 669 F.2d 23	5, 12
United States v. *Simonetti*, 326 F.2d 614	8
United States v. *Toombs*, 497 F.2d 88	7
Washington v. *Texas*, 388 U.S. 14	3
Zaroogian v. *United States*, 367 F.2d 959	8

Constitution, statute and regulation:

United States Constitution:	
Fifth Amendment (Due Process Clause)	1, 2, 3
Sixth Amendment (Compulsory Process Clause)	2
8 U.S.C. 1324(a)(2)	13
8 C.F.R.:	
Section 242.5	5
Section 287.4	5

Miscellaneous: Page

L. Baker, *John Marshall: A Life in Law* (1974).. 9, 10
IX P. Ford, *The Works of Thomas Jefferson* (1905) 9
I D. Robertson, *Reports of the Trials of Aaron Burr* (1808) 10

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In our opening brief we argued that the Due Process Clause supplied the relevant constitutional basis for deciding this case and that it required no more than that before the government deports illegal aliens who may be witnesses to a crime, it must make a reasonable inquiry into whether they have any material, exculpatory evidence to offer the defendant. Alternatively, we argued that, assuming the government must act at its peril when it deports illegal aliens, the defendant still must be required to make some concrete showing of the materiality of the lost witness; it is plainly insufficient to find a

constitutional violation if the missing witness can provide the defendant with no more than a "conceivable benefit" dreamed up by defense counsel or the court. Finally, we argued that even if the Ninth Circuit is correct that the action of the government in this case violated respondent's due process right, dismissal of his indictment was unwarranted. Respondent has addressed each of these points in ways that require a brief reply. In addition, there have been recent decisions by the First and Sixth Circuits on the issues presented in this case that we wish to call to this Court's attention.

1. In our opening brief we suggested that, although the point was not free of doubt, it seemed appropriate to analyze the government's conduct in deporting the illegal aliens under the Due Process Clause and not the Compulsory Process Clause. We pointed out that this Court has never extended the compulsory process right to situations involving claims of prosecutorial misconduct. Respondent asserts that this reasoning is "unworthy of the government" (Resp. Br. 22 n.27). We are at a loss to understand this reaction. Just this Term, Justices Rehnquist and O'Connor emphasized that under this Court's prior decisions, Sixth Amendment rights "may be implicated when a trial *court* mechanically applies state evidentiary rules to preclude a defendant from introducing exculpatory evidence necessary to his defense." *Israel* v. *McMorris*, No. 81-189 (Feb. 22, 1982), slip op. 3 (dissent from denial of certiorari; emphasis in original). By suggesting that the Compulsory Process Clause does not control these cases, the government is not attempting to insulate itself "from the consequences of its action" (Resp. Br. 22 n.27). Respondent does not explain why the

Due Process Clause is inadequate for reviewing the propriety of the government's conduct.[1]

2. In any event, under either constitutional provision, we submit that the proper analysis is whether the government has acted reasonably in deciding to release the illegal aliens.[2] Respondent argues that such an approach skews the adversarial process by allowing the prosecutor to decide which witnesses the defendant will have available in his defense.

Respondent's rhetoric, however, completely ignores the reasons for the government's actions. Indeed, nowhere in respondent's brief does he deny that de-

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[1] Indeed, the only support respondent offers for his novel theory that compulsory process is more than a trial right is a series of law review articles by a single commentator. The suggestion that compulsory process extends to investigation and preparation is quite simply created out of whole cloth. As the Court said in *Washington* v. *Texas*, 388 U.S. 14, 19 (1967), compulsory process is "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary * * *." Thus, it is the trial right to present evidence and no more.

[2] Respondent's suggestion (Resp. Br. 42) that the government should not be permitted to argue before this Court that there is no constitutional violation if the government makes a reasonable inquiry into the knowledge of the arrested illegal alien is misguided. Our first argument falls squarely within the question presented in our petition for a writ of certiorari and does not raise any separate issue. The question before the Court is what the Due Process Clause requires of the government, and it is our submission that it requires no more than a reasonable inquiry into whether the illegal aliens have any exculpatory evidence. Moreover, in light of the exclusive focus of the *Mendez-Rodriguez* doctrine on what conceivable benefits the witness could supply, it would have been futile to argue this specific point in the Ninth Circuit.

portation of these illegal aliens is reasonably designed to advance important and legitimate governmental interests.[3] The government does, after all, have other functions and responsibilities besides the prosecution of crimes, and no one has suggested that the illegal aliens were deported in this case for the purpose of weakening respondent's case or with any

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[3] Respondent does offer alternatives to immediate deportation, but none of them is satisfactory. Depositions still require detention of illegal aliens for a substantial period of time and, as we argued in our opening brief, generally are not useful (Pet. Br. 21 n.9).

Release of aliens with a parole letter requiring them to return is a useless gesture. Parole letters are effective only if a money bond has been posted to assure the return of the witness. Because of the circumstances surrounding the arrest of most illegal aliens, they have no resources available either personally or from friends and relatives to make the parole letter effective. Without that inducement to return, there is no realistic possibility that more than a handful of witnesses will be available for trial; most will be hiding inside the country. The best evidence of this is that it is virtually unheard of for a magistrate to release an illegal-alien material witness without bail being posted. Thus, the result of the parole procedure in most instances will be not only that the "witnesses" will be unavailable at trial, but also that the government's ability to carry out its statutory duty to deport them will be thwarted.

Keeping detainees in work farms has not measurably reduced the expense to the government, has not proven to be a secure means of keeping illegal aliens available, and still involves a deprivation of the aliens' liberty. Finally, waiver is, for reasons discussed in our earlier brief, also a flawed approach (Pet. Br. 21-22 n.9). There simply is no response available that is as effective as the approach in this case in furthering the important interests of the government while at the same time protecting the defendant's interest in producing witnesses who have material, exculpatory evidence.

belief that this might occur.[4] Illegal aliens are deported because that is the government's preferred response to the capture of illegal aliens at the border (8 C.F.R. 242.5, 287.4). It furthers important interests in protecting these individuals from needless incarceration and from requiring the government to incur substantial expense in maintaining custody over the aliens. To make the government's non-prosecutorial interest in these deportations clearer, perhaps the government should simply deport the aliens immediately without any investigation. See *United States* v. *Rose*, 669 F.2d 23, 27 (1st Cir. 1982). The government attempts, however, to protect defendants by assuring itself that the aliens in custody have no material exculpatory evidence. We are accordingly not claiming that the government can simply release all illegal aliens who are captured crossing the border. We seek to release only those who appear, after reasonable investigation, to have no evidence to offer in favor of the defendant. Certainly the release of aliens in cases where the defendant voluntarily admits his guilt at the time of arrest significantly advances the government's and the

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[4] It is this factor that distinguishes this case from the prosecutorial misconduct cases cited by respondent (Resp. Br. 35). We do not ask this Court to condone prosecutorial action designed to undermine the ability of a defendant to present a defense. This case involves government conduct to further completely legitimate purposes, but which admittedly has incidental effects on criminal prosecutions. So long as the government is sensitive to these incidental effects and makes reasonable efforts to assure that they are not substantial in any given case, there should be no constitutional impediment to prompt deportation.

illegal aliens' interests without substantially undermining the defendant's rights.[5]

3. Although respondent asserts on numerous occasions (Resp. Br. 34, 41, 43, 48, 51) that the two deported aliens involved in this case were "material" witnesses, he still has been unable to suggest any relevant, exculpatory evidence they would have offered. Respondent mentions that the aliens might have told respondent that they were legally in the United States or that they were in fact citizens (*id.* at 48). But respondent was charged only with transporting Romero-Morales, who was available to testify as to what *he* had told respondent with regard to his alien status. Respondent's knowledge of the others' illegal alien status is wholly irrelevant. Moreover, respondent has never previously indicated directly or through counsel that the two witnesses in fact told him anything about their alien status. To speculate at this point on a matter that is uniquely within the knowledge of the respondent is completely unwarranted.

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[5] Respondent offers (Resp. Br. 30) some data to indicate that the Ninth Circuit's *Mendez-Rodriguez* rule has created limited problems because it is raised by defendants so rarely and almost never successfully. The reason for this is clear: the government, in order to preserve its right to prosecute these cases, has needlessly detained in custody thousands of illegal aliens for varying periods of time, even though in the end these detained aliens almost never are called as defense witnesses. The relevant data for the effect of *Mendez-Rodriguez* on the government is that supplied by the United States Marshal of the Southern District of California, which we cited in our opening brief (Pet. Br. 19). Any rule that requires the government to have 50% of the population of its jails comprised of material witnesses most of whom never testify can hardly be described as "calculated to minimize fiscal, administrative, and human costs" (Resp. Br. 30).

Respondent also characterizes the illegal aliens as "eyewitnesses" to the crime, as though that were synonymous with being material witnesses. But the fact is that respondent has suggested nothing that they saw that would exculpate him. As eyewitnesses to respondent's criminal conduct, they certainly could have been material to the government, but their status as "eyewitnesses" in no way makes them "favorable" to the defendant. Thus, this Court in *Roviaro* v. *United States*, 353 U.S. 53 (1957), did not hold that the "eyewitness" status of a confidential informant was itself sufficient to overcome the government's interest in protecting the informant. Instead, the Court examined all of the circumstances and found that the informant's testimony was material because he had set up the heroin transaction that was the basis for the indictment, he was the sole witness to the exchange other than the defendant and the agent, and there was reason based on the circumstances surrounding the sale to suspect entrapment. *Id.* at 62-65. See also *Branzburg* v. *Hayes*, 408 U.S. 665, 698 (1972).

Courts applying *Roviaro* have routinely required more than merely the presence of the informant at the commission of the crime before ordering his identity disclosed as a material witness. See, *e.g.*, *Suarez* v. *United States*, 582 F.2d 1007, 1012 (5th Cir. 1978); *United States* v. *Estrella*, 567 F.2d 1151, 1153 (1st Cir. 1977); *United States* v. *Brown*, 548 F.2d 204, 208 n.3 (7th Cir. 1977); *United States* v. *Herbert*, 502 F.2d 890, 893 (10th Cir. 1974), cert. denied, 420 U.S. 931 (1975); *United States* v. *Toombs*, 497 F.2d 88, 93 (5th Cir. 1974); *United States* v. *Clark*, 482 F.2d 103, 106 (5th Cir. 1973); *United States* v. *Brenneman*, 455 F.2d 809, 811 (3d

Cir.), cert. denied, 408 U.S. 923 (1972); *Zaroogian* v. *United States*, 367 F.2d 959, 962 (1st Cir. 1966); *United States* v. *Simonetti*, 326 F.2d 614, 616 (2d Cir. 1964). See also *United States* v. *Eddings*, 478 F.2d 67, 71 (6th Cir. 1973); *United States* v. *Ferrone*, 438 F.2d 381, 386 (3d Cir.), cert. denied, 402 U.S. 1008 (1971); *Churder* v. *United States*, 387 F.2d 825, 831-832 (8th Cir. 1968) (Blackmun, J.).

One other claim of materiality offered by respondent (Resp. Br. 49) shows just how unworkable the Ninth Circuit's "conceivable benefit" test is. For the first time, respondent suggests to this Court that perhaps he was "kept hostage" prior to his attempt to transport these aliens and thus committed his crime under "duress." Indeed, according to respondent, it may be that one of the aliens who was released was "forcing [respondent] to drive" because in fact the deported alien was the smuggler (*ibid.*). One might well wonder why, if either of these "theories" had any basis in fact, respondent would have declined to make mention of them either at the time of his arrest, at the pretrial hearing on his motion to dismiss, at his trial on stipulated facts or even before the court of appeals. Notwithstanding the violence these theories do to the facts of this case, respondent finds in them the "conceivable benefit" that should free him from his criminal conviction.[6]

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[6] Respondent's suggestion (Resp. Br. 27) that the "conceivable benefit" standard should be adopted because it is a "bright-line" test is completely misguided. Given the ability of defense counsel and the Ninth Circuit, as reflected in this case, to imagine what testimony a witness could supply to a defendant, it is virtually impossible for the government to know in advance whether any illegal aliens it deports will lead to dismissal of a defendant's indictment. Both the "good faith" standard and the "materiality" standard proposed by us sup-

To support the need to hypothesize testimony, respondent claims (Resp. Br. 46) that he could not know what these witnesses possibly might say because they were not available to him. In this regard respondent relies heavily (Resp. Br. 18) upon some of Chief Justice Marshall's statements in *United States* v. *Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694). The Chief Justice's statements, however, should not be read out of the context of that case.

At issue there was a request to subpoena a letter from General Wilkinson to President Jefferson regarding allegedly treasonous activities of Aaron Burr in the Mississippi Territory, over which Wilkinson was the commander. Based largely on that letter, President Jefferson sent a special presidential message to Congress on January 22, 1807, in which he alleged that "[h]e [Burr] took his course then at once, * * * determined to seize on New Orleans, plunder the bank there, possess himself of the military and naval stores, and proceed on his expedition to Mexico * * *." L. Baker, *John Marshall: A Life in Law* 453 (1974) (quoting IX P. Ford, *The Works of Thomas Jefferson* 14-17 (1905)). In addition, General Wilkinson was expected to be the key witness for the prosecution; indeed, as one commentator has remarked "[w]ithout Wilkinson there was nothing." Baker, *supra*, at 475. Thus, regardless of

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ply much greater guidance for Border Patrol agents to follow. Once the agents have made a reasonable investigation and reasonably concluded that under the circumstances the captured aliens have no material, exculpatory evidence to offer, then the agents can proceed to remove the alien from this country with little or no fear of undermining the United States Attorney's ability to prosecute those who are responsible for moving other, detained illegal aliens across the border.

what the Chief Justice said in his oral opinion or what the prosecutors may have advocated in an extraordinary case, no one seriously can doubt the obvious significance of the Wilkinson letter to Burr's case. If nothing else, it certainly held great potential for impeachment. *United States* v. *Burr*, 25 F. Cas. 30, 36 (C.C.D. Va. 1807) (No. 14,692d).[7] Moreover, the contents of the letter could not be known by Burr because it was based on Wilkinson's investigation of Burr over an extended period of time and involving a very extensive alleged conspiracy. Respondent on the other hand was involved in a simple crime that took only a couple of days to commit, and he was present with the illegal aliens and thus presumably would ordinarily know exactly what, if anything, they could testify to that would benefit his case. In sum, there is simply no support in the *Burr* decision

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[7] Burr's counsel stated the point most eloquently:

> The funeral pile of the prosecution is already prepared by the hands of the public attorney, and nothing is wanting to kindle the fatal blaze but the torch of James Wilkinson. * * *
>
> Upon the conviction of colonel Burr, upon the guilt I say of colonel Burr, depends the innocence of general Wilkinson. * * * We have therefore the justest cause to scrutinize this gentleman's deposition. We have the strongest reasons to examine this gentleman's character, and to trace him in his most confidential walks.
>
> * * * * * *
>
> From his letters we have already had some glimpse of him; but I should wish, as I have said, to have him confronted with himself; I mean, to have his correspondence with the president of the United States opposed to whatever statement he may deliver here * * *

I D. Robertson, *Reports of the Trials of Aaron Burr* 151-156 (1807), *reprinted in* L. Baker, *John Marshall: A Life in Law* 479 (1974).

for relieving the respondent of his basic burden of showing the materiality of the deported aliens' testimony.

4. In order to justify dismissal of the indictment in this case, petitioner resorts to mischaracterizing both the nature of the government's actions and the value of the illegal aliens as witnesses. Respondent argues that this Court's decisions in *United States* v. *Lovasco*, 431 U.S. 783 (1977), and *United States* v. *Marion*, 404 U.S. 307 (1971), are distinguishable because they did not involve "deliberate prosecution action to harm the defendant" (Resp. Br. 54). This case, however, did not involve deliberate injury to respondent either. As in *Marion* and *Lovasco*, the government here was acting only in furtherance of important and legitimate interests and not with intent to injure respondent's ability to defend himself.

Unlike those cases, however, where the government's delay arguably prejudiced the defendant's case, the release of the two aliens here was immaterial to respondent's conviction. This fact similarly distinguishes the other cases cited by respondent, *e.g.*, *Jencks* v. *United States*, 353 U.S. 657 (1957); *United States* v. *Reynolds*, 345 U.S. 1 (1953); these witnesses were not "a storehouse of relevant fact." *Dennis* v. *United States*, 384 U.S. 855, 873 (1966). Thus, in terms of the effect of the absence of the two illegal aliens on respondent's trial, which we described in detail in our opening brief (Pet. Br. 30-31), this case is absolutely indistinguishable from *United States* v. *Morrison*, 449 U.S. 361 (1981). There is thus nothing in either the government's conduct or its effect on respondent's right to a fair trial that would warrant dismissal of his indictment.

5. Subsequent to the filing of our opening brief, two courts of appeals have rendered decisions on the

constitutionality of the government's deportation of illegal alien witnesses. The First Circuit in *United States* v. *Rose*, *supra*, held that the deportation of a juvenile who was on the boat when defendants were arrested for transporting marijuana did not violate the Constitution. The court found that the government had released the illegal alien because he was a juvenile, subject to special prosecutorial procedures, and that the government made no effort to determine whether the alien actually had any "value as a witness." 669 F.2d at 27. In addition, the court held that there had been no showing "that the deported witness would have been likely to offer meaningful evidence not obtainable from other available witnesses." *Id.* at 28.

With regard to the first holding, our prosecutorial objective would be satisfied if this Court were to hold that the government can simply deport arrested aliens without inquiry solely on the basis of the hardship their detention will cause both the individual alien and the government. Nevertheless, we do not favor such a course. It is our view that even in a case involving a juvenile, the government should make some inquiry into the value of the illegal alien as a witness for the defendant. Of course, in *Rose* it made no difference, since the court of appeals found that the witness plainly had no material evidence to offer the defendant.

The alternative holding of the First Circuit in *Rose* is, in our view, absolutely correct. Respondent should be allowed no greater protection than a defendant who faces the problem of destroyed evidence (*ibid.*) or, as we suggested in our opening brief, a defendant who has had knowingly perjured testimony introduced against him (Pet. Br. 35). In addition, the court of appeals in *Rose* recognized, as we have argued previously (see pages 7-8, *supra*), that the

mere presence of the potential witness at the time and place of a crime does not require a finding that his unavailability was prejudicial (669 F.2d at 27-28).

The second decision, from the Sixth Circuit, is *United States* v. *Armijo-Martinez*, No. 80-1798 (Feb. 5, 1982). In that case, a divided court of appeals adopted the Ninth Circuit's "conceivable benefit" approach. Indeed, *Armijo-Martinez* and this case are remarkably similar in their facts. In *Armijo-Martinez*, the defendants were captured red-handed transporting 18 illegal aliens in two vehicles (slip op. 1-2). At the time of the arrest, both defendants admitted that their passengers were illegal aliens, and all of the aliens told identical stories (*id.* at 2). The government decided to retain four witnesses for trial and to release the others. The government initially charged one defendant with 13 counts of violating 8 U.S.C. 1324(a)(2) and the other with five counts. But after the district court dismissed the indictments against the defendants, the government appealed *only* from those counts involving the four illegal aliens who had been detained and were available as trial witnesses (slip op. 21).[8]

The majority, relying solely on cases decided by other courts of appeals on this specific issue, held that the release of the witnesses violated the defendants' rights if the lost testimony could "conceivably benefit" the defendants (*id.* at 7-9). According to the majority, the test was satisfied here because, notwithstanding the defendants' confessions, the aliens

[8] Although this point is made by Judge Kennedy in her dissenting opinion, the majority never mentions this fact. Indeed, it never attempts to explain how the lost witnesses could possibly affect the defendants' ability to defend charges involving the alien status of the individuals who were available to be interviewed.

still could have testified as to their status as illegal aliens, which presumably was thought to have some undisclosed relevance to the defendants' knowledge of the status of the four aliens the defendants had been charged with transporting (*id.* at 14). With regard to remedy, the court distinguished this Court's decision in *United States* v. *Morrison*, *supra*, on the assertion that there is no relief short of dismissal to "neutralize the taint" caused by the government's action. *United States* v. *Armijo-Martinez*, *supra*, slip op. 16.

What makes the decision even more outrageous is a fact noted by Judge Kennedy in dissent. One of the defendants previously had been convicted of smuggling illegal aliens, and one of the four aliens who was transported in this case and detained by the government is the *same alien* who had been smuggled in the prior case. As Judge Kennedy aptly states (*id.* at 23):

> No matter what those other witnesses could state as to what Martinez was told to support Hernandez-Alvarez's legal status in this country, because of Martinez's prior involvement with him Martinez must almost certainly be found to have known that Hernandez-Alvarez was here illegally. However, under the majority's standard, the indictment against Martinez for transporting Hernandez-Martinez must be dismissed, because the government's act in making eyewitnesses unavailable has so "prejudiced" him that he cannot get a fair trial. I cannot accept this result either as an exercise of common sense or as good law under [*United States* v. *Morrison*, *supra*].

Our analysis differs from Judge Kennedy's reasoning in that she finds that the government violated the defendants' rights. We submit, however, that where,

as in this case, there is no basis for finding that the missing witness was material, there has been no constitutional violation at all. With regard to the remedy issue, Judge Kennedy does properly recognize that the "prejudice" caused by the government almost certainly could be minimized by proper instructions to the jury based on stipulations (Slip op. 23).

The opinions in *Armijo-Martinez* present various aspects of the issue in this case. Both *Rose* and *Armijo-Martinez* also show that the issues facing the Court here are not unique to Southern California. It is a problem the government may encounter anywhere and that requires a more sensible solution than to force illegal aliens to be detained against their will and unnecessarily, and to require the government to expend its limited resources to keep these individuals in custody, in order to protect no more than a chimerical benefit for the defendant who is plainly and admittedly guilty.

For the foregoing reasons and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

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